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ACCOUNT.

PRACTICE: ACCOUNT: ADMISSION: BURDEN OF PROOF. In an action upon an assigned account, a general denial will impose upon the plaintiff the burden of proving both the account and the assignment, but both are admitted by a special defence. *Bond v. Long*, 266.

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COSTS: ADMINISTRATION: ATTORNEY'S FEES: RECEIVER. Fees paid by a receiver to his attorney for professional service and advice in regard to the management of the property impounded, are part of the costs of administration, and are not taxable as costs in the litigation against the losing party. *The City of St. Louis v. The St. Louis Gas Light Co.*, 224.

WIDOW, ALLOWANCE FOR: STATUTE. The four hundred dollars allowed the widow by Revised Statutes, section 107, is an absolute provision for her own use to be disposed of as she may see proper, and she is entitled to it regardless of whether or not there are children of the marriage or the deceased left a family. *Mowser v. Mowser*, 437.

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EVIDENCE: ADMISSION. A party is not bound to accept in evidence an admission in lieu of a record, when the admission is not broad enough to embrace all the facts disclosed by the record, and the parol admission of a party made *in pais* is competent evidence only of those facts which may lawfully be established by parol evidence, and cannot be received to supply the place of existing

evidence by matter of record. *Bank of North America v. Crandall*, 208.

3. PRACTICE: ADMISSION: BURDEN OF PROOF. In an action upon an assigned account, a general denial will impose upon the plaintiff the burden of proving both the account and the assignment, but both are admitted by a special defence. *Bond v. Long*, 266.

ADVERSE POSSESSION.

1. LAND TITLE: ADVERSE POSSESSION: EJECTMENT. One who incloses and holds land by an open, notorious, adverse possession, against all the world, for a period of ten years will obtain thereby an indefeasible title in fee-simple to the land so inclosed and possessed. *Ekey v. Inge*, 493.

2. COLOR OF TITLE: ADVERSE POSSESSION. Where a defendant in an execution denies the validity of the sale of land thereunder and subsequently enters on and holds the premises adversely, the patent and deeds under which he held before the sale are sufficient to give color of title in aid of such adverse possession. *Gaines v. Saunders*, 557.

3. ——: GOOD FAITH OF OCCUPANT. Those claiming adversely under color of title must enter and occupy the land in good faith claiming the whole tract, relying on the color of title as being the legal title. *Ib.*

4. ——: ——: QUESTION OF FACT. Whether one who claims land adversely under color of title entered and occupied the same in good faith, relying on the color of title as being the legal one, is a question of fact for the jury. *Ib.*

5. COLOR OF TITLE. The evidence in this case held sufficient to authorize the court to declare that the color of title extended defendants' possession to the entire tract of land in suit. *Ib.*

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AGENCY.

1. AGENCY: BURDEN OF PROOF. Where one receives money as the agent of another, the burden is on him, in an action to account therefor, to show that he repaid it to his principal, or otherwise disposed of it by the latter's direction. *Young v. Powell*, 128.

2. BROKER, AGENCY OF. A broker for the purpose of signing the memoranda of the sale is the agent of both parties to the contract which he makes; but in other respects he is only the agent of the

party originally employing him. *Schlesinger v. The Texas & St. Louis Railway Company*, 146.

3. AGENCY: QUESTION OF FACT. Whether one was the agent of one person or another in a transaction, *held*, properly submitted to the jury. *Ib.*

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1. ——: STATEMENT: AMENDMENT. A statement before a justice of the peace, under Revised Statutes, section 803, which is held insufficient by the Supreme Court, upon the cause being remanded to the circuit court, may be there amended, if warranted by the facts. *Manz v. The St. Louis, Iron Mountain & Southern Railway Company*, 278.

2. PLEADING, AMENDMENT OF. The refusal of the trial court in this case, to permit plaintiff, before final judgment, to amend his petition in order to conform it to the proofs, held to be error. *Carr v. Moss*, 447.

3. ——: ——. The code in relation to amendment of pleadings is liberal, and the courts in relation to the same should at least be as liberal as the statute. *Ib.*

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2. APPEAL: PRESUMPTION. An appeal from an inferior court will be presumed to have been taken within the time allowed by law, where the record shows nothing to the contrary. *Feurth v. Anderson*, 354.

3. CONSTITUTION: APPEAL TO ST. LOUIS COURT OF APPEALS: AMOUNT IN DISPUTE: JURISDICTION. The relatrix brought suit on a penal bond in the sum of twenty-seven hundred dollars, and judgment was rendered for her for said sum, with execution for twenty-two hundred dollars, the amount of damages recovered by relatrix for the breach of the bond, and the defendant appealed to the St. Louis court of appeals. *Held*, that the amount in dispute on the appeal was twenty-two hundred dollars, the amount of damages recovered for the breach of the bond, and that the St. Louis court of appeals, and not the Supreme Court, therefore, had jurisdiction of the appeal. *The State ex rel. Heye v. The St. Louis Court of Appeals*, 569.

4. JUDGMENT LIEN, DURATION OF: APPEAL AND SUPERSEDEAS. An appeal from a judgment of the circuit court and a *supersedeas* thereon will not have the effect to extend the judgment lien beyond the time prescribed by the statute. *Christy v. Flanagan*, 670.

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——: INSULTING EPITHETS: ASSAULT. Insulting epithets or opprobrious words will not justify an assault. *The State v. Griffin*, 603.

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——: ——: ASSIGNEE. The plaintiff is entitled to recover on the policy, where it appears that he is the legal assignee of the policy, and is the equitable owner of the interest of the insured in the land on which the insured house was situated. *Breckinridge v. The American Central Insurance Company*, 62.

ASSIGNMENT.

PRACTICE: ADMISSION: BURDEN OF PROOF. In an action upon an assigned account, a general denial will impose upon the plaintiff the burden of proving both the account and the assignment, but both are admitted by a special defence. *Bond v. Long*, 266.

See ASSIGNEE.

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1. PRACTICE: ATTACHMENT: MISJOINDER OF PARTIES. The improper joinder of a defendant in an attachment suit is no ground for dissolving the attachment. *Albers v. Bedell*, 183.

2. JUDGMENT: EVIDENCE: ATTACHMENT: GARNISHEE. A judgment for or against a garnishee in an action of attachment by one creditor is not binding upon another creditor in an attachment suit by him against the same garnishee, and the record of the judgment in the former case is not admissible in evidence on the trial of the latter. *Strauss v Ayres*, 348.

ATTORNEY AND CLIENT.

1. CLIENT AND ATTORNEY: TRUSTEE. Where an attorney purchases land in his own name, at a sale under an execution in favor of his client, the latter has the option to treat the attorney as his trustee, but such right of election must be exercised by the client within a reasonable time. *Ward v. Brown*, 468.

2. ADMINISTRATOR. Where the client, in such case, is the administrator of an estate, his acts and conduct in the matter of such purchase will bind the heirs and the estate. *Ib.*

ATTORNEY'S FEES.

COSTS: ADMINISTRATION: ATTORNEY'S FEES: RECEIVER. Fees paid by a receiver to his attorney for professional service and advice in regard to the management of the property impounded, are part of the costs of administration, and are not taxable as costs in the litigation, against the losing party. *The City of St. Louis v. The St. Louis Gas Light Co.*, 224.

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See TAXES, 4.

BANK.

1. DEED, AUTHORITY OF PRESIDENT OF BANK TO MAKE. Under the evidence in this case held that the president of a bank had no authority to execute the bank's deed, conveying land for the benefit of creditors, and also that the authority of the president to make the deed in question could not be sustained on the ground of the bank's acquiescence therein. *McKeag v. Collins*, 164.

2. TAXATION: BANK STOCK. Assessment of taxes against bank stock must be made against the shareholders personally. *The City of Springfield* v. *The First National Bank of Springfield*, 441.

3. ——: ——. The fact that the officers of the bank refuse to furnish the assessor with a list of shareholders, affords no reason for making the assessment and enforcing the tax against the property of the bank. *Ib.*

BANK STOCK.

See BANK, 2, 3.

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FRAUD IN CREATION OF DEBT: DISCHARGE IN BANKRUPTCY. Where

worthless and fraudulent bonds are knowingly given as security for a debt at the time of its creation, this will constitute such fraud as will bring the case within the exception of the bankrupt act, and prevent a discharge in bankruptcy from operating as a bar to a recovery for the debt. *Bank of North America v. Crandall*, 203.

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1. THE FINDING of the trial court that certain notes, secured by a deed of trust, were held by the maker, as agent of the owner, and had not been paid, affirmed. *Bowman v. The St. Louis Times*, 191.

2. NOTE: POSSESSION BY MAKER. The fact that a note, after having been put into circulation by the maker for value, comes into the hands of the latter as an agent of a third party, will not defeat recovery thereon by the latter. *Ib.*

3. CHECK: PAYEE: DRAWER. Where the payee to whom a check is delivered by the drawer, receives it in the same place where the bank on which it is drawn is located, he may preserve recourse against the drawer by presenting it for payment at any time before the close of banking hours on the next day, and if in the mean time the bank fails the loss will be the drawer's. *Wear v. Lee*, 353.

BOUNDARIES.

1. EJECTMENT: BOUNDARIES: PRACTICE. What are the boundaries of land conveyed by deed is a question of law; where the boundaries are is a question of fact. *The City of St. Louis v. Meyer*, 276.

2. ——: PRACTICE. It is error to instruct a jury to disregard surveys, properly in evidence, in determining the position of boundary lines mentioned in the deed in suit. *Ib.*

3. ——: BOUNDARIES. That partitioners place certain stones that mark boundary lines upon land adjoining their own, does not have the effect of changing the boundary lines. *Ib.*

4. ——: EVIDENCE. Under a claim that a certain street marks a boundary line, it is error to admit in evidence proceedings to open such street, the judgment in which had been vacated for want of jurisdiction. *Ib.*

BROKER.

BROKER, AGENCY OF. A broker for the purpose of signing the memoranda of the sale is the agent of both parties to the contract which he makes; but in other respects he is only the agent of the party originally employing him. *Schlesinger v. The Texas & St. Louis Ry. Co.*, 146.

BURDEN OF PROOF.

1. ——: BURDEN OF PROOF. The burden of proving the fraudulent abstraction of money is on him who alleges it. *Priest v. Way*, 16.

2. AGENCY: BURDEN OF PROOF. Where one receives money as the agent of another, the burden is on him, in an action to account therefor, to show that he repaid it to his principal, or otherwise disposed of it by the latter's direction. *Young v. Powell*, 128.

3. PRACTICE: ADMISSION: BURDEN OF PROOF. In an action upon an assigned account, a general denial will impose upon the plaintiff the burden of proving both the account and the assignment, but both are admitted by a special defence. *Bond v. Long*, 266.

4. MASTER AND SERVANT: BURDEN OF PROOF. The law presumes that the master exercises care in the employment of his servants, and the burden is upon him who alleges negligence in this particular to prove it. *McDermott v. The Hannibal & St. Joseph Railway Company*, 285.

BURGLARY.

1. BURGLARY: CONSTITUTION: STATUTE. The general assembly cannot, under the constitution, authorize a prosecution for burglary in a county other than the one in which the crime was committed. *The State v. McGraw*, 161.

2. INDICTMENT: BURGLARY AND LARCENY: FELONIOUSLY. An indictment which charges that defendant "feloniously, and burglariously, * * * did break into the storeroom * * * with intent the goods * * * then and there being, then and there feloniously and burglariously to steal * * * and did then and there burglariously steal, take and carry away," etc., sufficiently charges the felonious intent. *Ib.*

CHARACTER.

See EVIDENCE, 66.

CHECK.

CHECK: PAYEE: DRAWER. Where the payee to whom a check is delivered by the drawer, receives it in the same place where the bank on which it is drawn is located, he may preserve recourse against the drawer by presenting it for payment at any time before the close of banking hours on the next day, and if in the meantime the bank fails the loss will be the drawer's. *Wear v. Lee*, 358.

CLOUD UPON TITLE.

EQUITY: INJUNCTION: CLOUD UPON TITLE: ADVERTISEMENT: RECEIVER: TRUSTS AND TRUSTEES. *Ohnsorg v. Turner*, 127.

See EQUITY 4, 5.

COLOR OF TITLE.

1. COLOR OF TITLE: ADVERSE POSSESSION. Where a defendant in an execution denies the validity of the sale of land thereunder and subsequently enters on and holds the premises adversely, the patent and deeds under which he held before the sale are sufficient to give color of title in aid of such adverse possession. *Gaines v. Saunders*, 557.

2. ——: GOOD FAITH OF OCCUPANT. Those claiming adversely under color of title must enter and occupy the land in good faith claiming the whole tract, relying on the color of title as being the legal title. *Ib.*

3. ——: ——: QUESTION OF FACT. Whether one who claims land adversely under color of title entered upon and occupied the same in good faith, relying on the color of title as being the legal one, is a question of fact for the jury. *Ib.*

4. ——. The evidence in this case held sufficient to authorize the court to declare that the color of title extended defendants' possession to the entire tract of land in suit. *Ib.*

5. EVIDENCE: PAYMENT OF TAXES. The assessment to a party and payment by him of taxes are evidence on the question of the good faith of another in entering upon land under color of title, in the light of other circumstances tending to show a disclaimer of title by the latter. *Ib.*

COMMON REPORT.

See EVIDENCE, 7, 8.

CONSTITUTIONAL LAW.

1. DOUBLE DAMAGE ACT, CONSTITUTIONALITY OF. The double damage act (R. S., sec. 809), held to be constitutional, both as regards the state and federal constitutions. *Hamilton v. The Missouri Pacific Ry. Co.*, 85.

2. CONSTITUTIONAL LAW: INCREASE OF SALARY DURING TERM: TERM OF OFFICE. The salary of the assessor and collector of water rates of the city of St. Louis, whose term of office is for "four years and until his successor shall have been duly appointed and qualified," cannot be increased during the term for which he was appointed. And the time he holds over the designated period of four years is as much a part of the term of his office as that which precedes the date at which the new appointment should be made, and no increase of salary made during his term can be allowed him for such time so held over. Const. 1875, art. 14, sec. 8; Scheme and Char-

ter, R. S., p. 1587, par. 8, p. 1627, sec. 17. *The State ex rel. Stevenson v. Smith*, 158.

3. BURGLARY: CONSTITUTION: STATUTE. The General Assembly cannot, under the constitution, authorize a prosecution for burglary in a county other than the one in which the crime was committed. *The State v. McGraw*, 161.

4. MUNCIPAL CORPORATION: STREET: CONSTITUTION. A city ordinance, passed in pursuance of a charter requiring the city to keep its streets in repair, is not unconstitutional because it directs the city engineer to make the repairs at the expense of the adjacent property owner without notice to the latter. *The City of Kansas v. Huling*, 203.

5. ——: ——. When sued on the special tax bill the property owner can have his day in court and make his defence. *Ib.*

6. CONSTITUTIONAL LAW: INDEBTEDNESS OF COUNTY. Section twelve of article ten of the constitution prohibiting any "political corporation or subdivision of the state from becoming indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose," has no application to a debt incurred by a county for the keeping and transporting of its prisoners by the sheriff or jailor of another county, under the provisions of Revised Statutes, section 6090. Distinguishing *Book v. Earl*, *post*, p. 246; *Potter v. Douglas Co.*, 239.

7. CONSTITUTION: COUNTY COURT, POWER TO CONTRACT. A county court cannot under the present constitution of the state contract a debt for any purpose in excess of its revenue for the current year. *Book v. Earl*, 246.

8. ——: ——: IMPROVEMENT OF COURT HOUSE. Where it is desired to create a debt in excess of such revenue for the improvement of the county court house, such question must be submitted to the qualified voters of the county as required by the constitution. *Ib.*

9. REVISED STATUTES, SECTION 5337, CONSTRUCTION OF. Revised Statutes, section 5337, relating to the power of the county court to alter and repair county buildings must be construed in subordination to the provisions of the constitution prohibiting the making of a debt by the court in excess of the county revenue for the current year. *Ib.*

10. CONSTITUTION: WHEN A LAW WILL BE DECLARED UNCONSTITUTIONAL. The courts will not declare an act of the general assembly unconstitutional, unless the conflict with the constitution is so manifest as to leave no doubt on the subject. *Kelly v. Meeks*, 396.

11. ——: GENERAL LAW. The act of the legislature of March 11, 1885 (Acts 1885, p. 63), authorizing any city containing more than

twenty thousand, and less than two hundred and fifty thousand inhabitants, existing by virtue of special or local laws, to extend its limits, etc.. is a general law, and is, therefore, not within the inhibitions of the constitution against the enactment of special or local laws for the regulation of cities and towns. *Ib.*

12. ——— : LAW AUTHORIZING CITIES TO EXTEND THEIR LIMITS. While such acts conferring on cities the power to extend their limits are constitutional and valid, yet the power so conferred must be reasonably and properly exercised. *Ib.*

13. CONSTITUTION : APPEAL TO THE ST. LOUIS COURT OF APPEALS : AMOUNT IN DISPUTE : JURISDICTION. The relatrix brought suit on a penal bond in the sum of twenty-seven hundred dollars, and judgment was rendered for her for said sum, with execution for twenty-two hundred dollars, the amount of damages recovered by relatrix for the breach of the bond, and the defendant appealed to the St. Louis court of appeals, *Held*, that the amount in dispute on the appeal was twenty-two hundred dollars, the amount of damages recovered for the breach of the bond, and that the St. Louis court of appeals, and not the Supreme Court, therefore, had jurisdiction of the appeal. *The State ex rel. Heye v. The St. Louis Court of Appeals*, 569.

CONSTRUCTION.

1. PRACTICE : ALLEGATA AND PROBATA : CONSTRUCTION : PENALTY : STATUTE. Section 809, Revised Statutes, is a penal statute, and in proceedings under statutes exacting a penalty greater strictness of construction, both as to the allegations and the proof, is required than in ordinary cases. *Manz v. The St. Louis, Iron Mountain & Southern Ry. Co.*, 278.

2. CONSTRUCTION : REVISED STATUTES, SECTION 2122. Section 2122 of the Revised Statutes is in derogation of the common law and should receive a reasonably strict construction. *Jackson v. The St. Louis, Iron Mountain & Southern Ry. Co.*, 422.

3. STATUTE, CONSTRUCTION OF : SPECIAL LAW. A special statute, applicable to a particular subject, if inconsistent with a general law in relation thereto, will prevail over the latter. *The State v. Green*, 583.

4. ——— : ———. It is a well settled rule in the construction of statutes that a later statute which is general and affirmative does not abrogate a former one which is particular and special, unless negative words are used in the former or the two acts are irreconcilably repugnant. *Ib.*

CONSTRUCTIVE POSSESSION.

See POSSESSION. 6.

CONTRACTS.

1. SPECIFIC PERFORMANCE. In a suit for the specific performance of a contract for the purchase of land, the evidence of the agreement should be reasonably certain and satisfactory. *Tedford v. Trimble*, 226.

2. CONTRACT, ILLEGALITY OF. The plaintiff, who was the attorney of a water works company, and was also a member of the local board, the latter having power to make contracts and fix the prices for the construction of the works, without the knowledge of the company entered into an agreement with defendant, the contractor for the construction of the works, whereby the plaintiff was to share with defendant in the profits of the contract. *Held*, that plaintiff was *in delicto* and could not recover of defendant on such contract. *Green v. Corrigan*, 359.

3. ——. An exception to the maxim, *in pari delicto potior est conditio defendentis et possidentis*, arises where the parties to the transaction, although concurring in the illegal act, are not to be regarded as equally guilty in consequence of fraud, oppression, imposition or hardship practiced by one party upon the other, thereby attaining an unconscionable advantage. *Ib.*

4. ANTE-NUPTIAL AGREEMENT: CONSIDERATION: EVIDENCE. A parol ante-nuptial agreement between husband and wife, that, upon the death of either the other should claim no interest in the estate of the deceased, is not admissible against the widow in a suit by her for the allowance given her by Revised Statutes, section 107, where she has received nothing as a consideration for the alleged agreement. *Mowser v. Mowser*, 437.

5. HUSBAND AND WIFE: DOWER, CONTRACT IN LIEU OF. It is against public policy to allow a man by an agreement before marriage, which does not secure to the wife after his death a provision for her support during her life, to bar her right to dower. *Ib.*

CONTRIBUTION.

CONTRIBUTION: PROBATE COURT. Courts of law have adopted the equitable doctrine of contribution, and relief will be awarded in the probate court to one surety who has paid more than his proportionate share of the debt. *Jeffries v. Ferguson*, 244.

CONTRIBUTORY NEGLIGENCE.

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CONVERSION.

VARIANCE. In an action for the fraudulent abstraction and conversion of property, there can be no recovery on the ground that it was

obtained as a gift by the exercise of undue influence. *Priest v. Way*, 16.

CORPORATIONS.

1. CORPORATION: STOCKHOLDER, WHEN EXECUTION MAY ISSUE AGAINST: STATUTE. Under Revised Statutes, section 736, where execution has issued against a corporation and been returned *nulla bona*, the judgment creditor may, upon order of the court in which the suit shall have been instituted, made upon motion in open court, after sufficient notice, have execution issued against any stockholder to the extent of the amount of such stockholder's unpaid balance on his stock. *Paxon v. Talmage*, 13.

2. ——: ——: ——. The proceeding authorized by Revised Statutes, section 736, is not an original one, but supplemental to a prior proceeding in the same court which resulted in a judgment against the corporation followed by a barren execution. *Ib.*

3. ——: PLEADING: PRACTICE. A petition in a cause which does not ask for judgment against defendant as a stockholder, but only for an order for execution against him on the basis of a judgment already obtained against his corporation in another court, can only be treated as a motion for an order for an execution under Revised Statutes, section 736, and must fail because not filed in the court where the judgment was obtained. *Ib.*

4. CORPORATION: ESTOPPEL. A person who deals with a corporation is estopped to deny its legality or incorporation. *Broadwell v. Merritt*, 95.

5. THE RULE APPLIED to a case where one, for a valuable consideration, made a deed of real estate to the "German Building Association of Kansas City" as grantee before its articles of incorporation were filed with the secretary of state. *Ib.*

6. PRIVITY: ESTOPPEL. One who holds under said grantor by subsequent conveyances, which are in effect quit-claim deeds, is in no better position than such grantor. He is in privity with and bound and estopped by the facts which estop said grantor. *Ib.*

7. DEED, AUTHORITY OF PRESIDENT OF BANK TO MAKE. Under the evidence in this case held that the president of a bank had no authority to execute the bank's deed, conveying land for the benefit of creditors, and also that the authority of the president to make the deed in question could not be sustained on the ground of the bank's acquiescence therein. *McKeag v. Collins*, 164.

COSTS.

1. INJUNCTION: COSTS. Where one is enjoined from prosecuting his business, dispossessed of his property, and a receiver appointed to take charge, at the plaintiff's instance, the compensation for the

receiver's services is taxable as costs against the plaintiff, the losing party. *The City of St. Louis v. The St. Louis Gas Light Co.*, 223.

2. COSTS: ADMINISTRATION: ATTORNEY'S FEES: RECEIVER. Fees paid by a receiver to his attorney for professional service and advice in regard to the management of the property impounded, are part of the costs of administration, and are not taxable as costs in the litigation against the losing party. *The City of St. Louis v. The St. Louis Gas Light Co.*, 224.

3. PARTITION: COSTS. The proceeds of the sale of one tract of land, sold for the purposes of partition, cannot be applied in payment of fees or costs accrued in proceedings for partition of another tract of land. *The Liberty Savings Association v. The Commercial Savings Bank*, 225.

COUNSEL.

——: EXCLUSION OF EVIDENCE: REMARKS OF COUNSEL. Counsel should not be permitted, over objection of the opposite party, to comment upon excluded testimony in argument to the jury and to treat it as evidence in the case: and it is error, in such case, for the court to fail to rebuke counsel, and at the request of the injured party, to again, in writing, exclude such testimony from the jury. *Ritter v. The First Nat. Bank of Springfield*, 574.

COUNTY COLLECTOR.

See CRIMINAL LAW, 21.

COUNTY COURT.

1. TAXATION: POWER OF COUNTY COURT TO LEVY TAX. A railroad interest fund tax and railroad sinking fund tax, not being state taxes, or taxes necessary to pay the funded or bonded debt of the state, or for current county expenditures, or for schools (R. S., sec. 6798), cannot be levied by the county court without a compliance with section 6799 of the Revised Statutes. *The State ex rel. Clinton County v. The H. & St. J. Ry. Co.*, 236.

2. ——: ——. The county court has no implied power to levy a tax. Such power must be clearly and expressly given by statute, and if the legislature in conferring the power imposes conditions upon which it may be exercised, such conditions must be observed before the power can be lawfully exercised. *Ib.*

3. CONSTITUTION: COUNTY COURT, POWER TO CONTRACT. A county court cannot, under the present constitution of the state, contract a debt, for any purpose, in excess of its revenue for the current year. *Book v. Earl*, 246.

4. ——: ——: IMPROVEMENT OF COURT HOUSE. Where it is de-

sired to create a debt in excess of such revenue for the improvement of the county court house, such question must be submitted to the qualified voters of the county as required by the constitution. *Ib.*

5. REVISED STATUTES, SECTION 5337, CONSTRUCTION OF. Revised Statutes, section 5337, relating to the power of the county court to alter and repair county buildings must be construed in subordination to the provisions of the constitution prohibiting the making of a debt by the court in excess of the county revenue for the current year. *Ib.*

6. STATUTE: CURRENT COUNTY EXPENSES. A contract for remodeling and building three new additions to the court house does not fall within "other ordinary current expenses of the county," mentioned in Revised Statutes, section 6818. *Ib.*

7. COUNTY COURT, AUTHORITY OF TO EMPLOY COUNSEL: COMPENSATION. The county court of any county has authority, by an order of record, to employ attorneys to aid the prosecuting attorney in any civil business, upon such terms as it shall deem proper, when in the judgment of the court the interests of the county require it. *Thrasher v. Greene County*, 419.

8. SUIT TO TEST VALIDITY OF SUBSCRIPTION TO RAILROAD: NECESSITY FOR. Where the Supreme Court of the state has held the subscription of a county to a railroad and the bonds issued thereunder void, and the circuit court of the United States has held such bonds in circulation to be valid, it cannot be said that a suit by the county to test the validity of its subscription is wholly useless, where the railroad claiming to have acquired such subscription was not a party to either of the suits mentioned. *Ib.*

COUNTY INDEBTEDNESS.

See CONSTITUTIONAL LAW, 6.

COUNTY COURT.

COVENANT AGAINST ENCUMBRANCES.

COVENANT AGAINST ENCUMBRANCES, ACTION ON: RES JUDICATA. A grantor of land conveyed the same by a deed which contained a covenant against encumbrances done or suffered by him. There was in fact an outstanding lease made by the grantor, and before its expiration the grantee in the deed brought suit and recovered damages for breach of the covenant. *Held* (1) That the plaintiff's cause of action on the covenant was entire and indivisible, and (2) that, therefore, he could not maintain a second action, although the assessment of the rents and profits of the land as damages in the first suit was made only up to the time of its institution. *Taylor v. Heitz*, 660.

CRIMINAL LAW.

1. PLEADING, CRIMINAL: INDICTMENT: MANSLAUGHTER UNDER REVISED STATUTES, SECTION 1238. An indictment for manslaughter, under Revised Statutes, section 1238, must charge that the killing was done without a design to effect death, and while the doer of the act was engaged in the perpetration or attempt to perpetrate a crime not amounting to a felony, and it is not sufficient that these things may be inferred from the allegations made. Per Sherwood, J. *The State v. Emerich*, 110.

2. ——: ——: FELONY. In an indictment for a felony causing death it is not sufficient to allege that the assault was feloniously made, and that the instrument used was feloniously used, but it must be charged that the act itself, which caused the death, was feloniously done. Per Sherwood, J. *Ib.*

3. ——: ——: STATUTE. An indictment based upon a statute, must contain all the forms of expression and descriptive words which will bring the defendant precisely within the definition of the statute. But where descriptive words are not used in the statute in defining the crime, it will be sufficient to use words of equivalent import in the indictment, making the charge certain to a certain extent. Per Sherwood, J. *Ib.*

4. ——: ——: MANSLAUGHTER: REVISED STATUTES, SECTION 1241. An indictment for manslaughter under Revised Statutes, section 1241, which does not contain the words, "pregnant with a quick child," is fatally defective. Per Sherwood, J. *Ib.*

5. ——: ——: RETROSPECTIVE STATUTE: REVISED STATUTES, SECTION 1268. Revised Statutes, section 1268, having been amended in 1879 by the addition of the words, "but if the death of such woman ensue from the means so employed, the person so offending shall be deemed guilty of manslaughter in the second degree," does not apply to an abortion defined therein from which death results, where the same was perpetrated prior to the taking effect of the Revised Statutes of 1879. *Ib.*

6. CRIMINAL LAW: INSTRUCTIONS: EVIDENCE. While it is the duty of the trial court in a criminal cause to give instructions upon all the law applicable to the facts in evidence, whether requested to do so or not, it should confine its instructions to the case made by the testimony. *The State v. Brady*, 142.

7. PRACTICE: WITNESS: CROSS-EXAMINATION. When the state introduces a witness and examines him, the defendant may cross-examine him as to all matters involved in the case, no matter how formal or unimportant the examination in chief may have been. *Ib.*

8. BURGLARY: CONSTITUTION: STATUTE. The General Assembly cannot, under the constitution, authorize a prosecution for burglary in a county other than the one in which the crime was committed. *The State v. McGraw*, 161.

9. EVIDENCE. Declarations of a conspirator, made after the conclusion of the common enterprise, are inadmissible against a co-conspirator. *Ib.*

10. INDICTMENT: BURGLARY AND LARCENY: FELONIOUSLY. An indictment which charges that defendant "feloniously and burglariously, * * * did break into the storeroom * * * with intent the goods * * * then and there being, then and there feloniously and burglariously to steal * * * and did then and there burglariously steal, take and carry away," etc., sufficiently charges the felonious intent. *Ib.*

11. CRIMINAL LAW: EVIDENCE: CLOTHING WITH BLOOD STAINS. On a trial for homicide, it is proper to admit in evidence and to permit the jury to inspect clothing worn by the accused on and soon after the day of the commission of the crime and having thereon blood stains. The fact that such garments cannot be filed with the bill of exceptions is no reason for excluding them, the descriptive evidence being sufficient to enable the court to pass upon the competency of the evidence. *The State v. Stair*, 268.

12. ——: ——: IDENTITY OF HANDWRITING. A paper, claimed to be in the handwriting of the defendant, is sufficiently proved to go to the jury, where a witness called to identify it testifies that he had seen defendant write two or three notes and sign his name to another, that he thought he could tell defendant's handwriting, and that he judged the paper shown him and afterwards read in evidence was in defendant's handwriting: that he was not positive, but so judged from a comparison of the writing with his memory of what defendant wrote. *Ib.*

13 EVIDENCE: WRITING FOUND IN POSSESSION OF ACCUSED. Where one of two joint defendants was arrested for murder, there was found, in a pocket-book in his possession, a paper with the following words in his handwriting: "Do you think it safe to kill them and wrap them up in the clothes and tell that they went off in a buggy." *Held*, that this writing was competent evidence against said defendant in whose possession it was found, the proof tending to show that he acted on the suggestion contained therein. *Ib.*

14. ——: ——. Such writing, however, was not competent as against the other defendant, the wife of the one in whose possession it was found, it not being shown by the state when it was written or that she had any knowledge of it, and it not being proved to be a part of the *res gestae*. *Ib.*

15. SUPREME COURT PRACTICE: SEPARATE REVERSALS. The defendants having been separately arraigned and sentenced, although tried together, the verdict is a separate finding as to each, and the judgment may be affirmed as to one and reversed as to the other. *Ib.*

16. CRIMINAL LAW: EVIDENCE: DYING DECLARATIONS. Dying declarations, to be admissible in evidence, must have been made in apprehension of death, after all hope of life had been abandoned, and must be restricted to the identification of the accused and the de-

ceased, and to the act of killing and the circumstances immediately attending it and forming a part of the *res gestae*. *The State v. Chambers*, 406.

17. ——: ——: ——. Dying declarations constituting a mere expression of opinion or belief are inadmissible in evidence. *Ib.*

18. ——: INSTRUCTION: MANSLAUGHTER. The definitions of manslaughter in the fourth degree, as given in Revised Statutes, sections 1249 and 1250, should not be blended in the same instruction, but that offence as defined in said sections should be contained in separate instructions. *Ib.*

19. PLEADING, CRIMINAL: PERJURY: INDICTMENT. An indictment for perjury which names and particularizes the cause in which the alleged perjury was committed, and the court in which the cause was tried, avers the materiality of the issue so that the court can determine it; avers that the oath was administered by one having competent authority, sets out the facts alleged to have been sworn to, negatives their truth, and properly assigns perjury upon them, is sufficient under Revised Statutes, section 1424. *The State v. Huckeby*, 414.

20. THE INDICTMENT for perjury in this case examined and held sufficient. *Ib.*

21. CRIMINAL LAW: COUNTY COLLECTOR: COLLECTING ILLEGAL TAXES: STATUTE. Prosecutions against a county collector for collecting illegal taxes must be founded on Revised Statutes, section 1487, which makes it a misdemeanor for a collector to unlawfully collect taxes when none are due, or to unlawfully and wilfully exact and demand more than are so due. *The State v. Green*, 583.

22. ——: ——: STATUTE. Such prosecutions cannot be instituted under Revised Statutes, section 1335, for obtaining money under false pretenses, nor under Revised Statutes, section 1561, for obtaining money by use of a cheat, deception, false statement, etc. *Ib.*

23. CRIMINAL LAW: GRAND JURY. The Supreme Court will not reverse a judgment because the record fails to show that the grand jury which found the indictment was selected and summoned according to law. *The State v. Grifin*, 608.

24. INDICTMENT: FAILURE TO INDORSE MATERIAL WITNESSES THEREON. The objection that the names of all the material witnesses for the state are not indorsed on the indictment, should be raised by a motion to quash the indictment. *Ib.*

25. SELF-DEFENCE. An instruction on the question of self-defence approved. *Ib.*

26. CRIMINAL LAW: FLIGHT OF ACCUSED. The flight of one charged with crime is a circumstance tending to prove guilt, and should

be considered by the jury and an instruction of the court to that effect is proper. *Ib.*

27. ——: INSULTING EPITHETS: ASSAULT. Insulting epithets or opprobrious words will not justify an assault. *Ib.*

28. ——: NEW TRIAL: NEWLY DISCOVERED EVIDENCE. Newly discovered evidence which is cumulative in its character affords no ground for a new trial. *Ib.*

29. CRIMINAL PRACTICE: REMARKS OF COUNSEL FOR STATE. Certain remarks of counsel for the state in his closing argument to the jury held to afford no cause for a reversal of the judgment. *Ib.*

30. ——: PROSECUTING ATTORNEY, INABILITY TO ACT: APPOINTMENT IN PLACE OF. The appointment by the court of four attorneys to prosecute a defendant on a criminal charge where the prosecuting attorney was disqualified to act, by reason of having been of counsel for defendant, condemned as improper practice, although held not to be reversible error. *Ib.*

31. CRIMINAL PRACTICE: PREJUDICE OF JUROR: NEW TRIAL. It is a good ground for a new trial when a juror, on his *voir dire* examination, has stated that he has neither formed nor expressed an opinion as to the guilt or innocence of the accused, it comes to the knowledge of the latter, after verdict, that such juror had prejudged the case, and that fact is made to appear to the satisfaction of the court. *The State v. Gonce*, 627.

32. ——: ——. Whether in such case the juror had prejudged the case is a question of fact to be determined by the trial judge, on sworn statements, and the finding of the trial court thereon, when supported by evidence which it was his duty to weigh and consider, will not be disturbed. *Ib.*

33. ——: ABSENCE OF DEFENDANT FROM TRIAL. The absence of defendant from the court during a part of the time of the trial, held, under the circumstances of this case, not to be a sufficient ground for a new trial. *Ib.*

34. ——: EVIDENCE. On a trial for murder it is not competent for the defendant to testify as to his belief and apprehension of bodily harm and danger when he killed the deceased. *Ib.*

35. ——: ——. It is for the jury to determine, from the facts in evidence, whether the accused had reasonable cause to believe or apprehend from the deceased, danger to his life or limb when he committed the homicide. *Ib.*

36. ——: ——. The specific grounds of the objections to evidence should be stated. *Ib.*

37. ——: IMPEACHING WITNESS. Where it is sought to impeach a de-

fendant who testified as a witness, by offering to read in evidence his statements contained in an affidavit for a continuance, a sufficient foundation is laid for its introduction when it is shown to defendant, and he admits he signed and swore to it, although he was not examined as to its contents. *Ib.*

38. ——. The record in this case held to sufficiently show that the judge who presided at the trial, and who was the judge of another circuit, had the authority to try the cause. *Ib.*

39. CRIMINAL LAW: EVIDENCE: THREATS. On a trial for homicide, evidence of threats should not be rejected because of their vagueness or the obscurity of language in which they are couched, and the threats of deceased, made fifteen minutes before his death, that he "was going to have blood before morning," are properly admitted upon the trial of one charged with his murder, as tending to show that the deceased was the aggressor. *The State v. McNally*, 644.

40. ——: ——: ——. The nearness or remoteness of threats to the date of the commission of the crime does not affect their admissibilty or competency. *Ib.*

41. ——: OFFICER: ARREST. A peace officer has the right to arrest without warrant for a misdemeanor where the arrest is made *flagrante delicto*, and he is possessed of the same powers in making such arrest, and is authorized to employ the same force, and to resort, where necessary, to the same extreme measures in overcoming resistance, as in case of a felony. Per Sherwood and Black, JJ. *Ib.*

42. ——: ——: ——. If an officer, in making an arrest for a misdemeanor, is resisted, he may apply force to accomplish the arrest, and if it become necessary to kill the offender to save his own life or person from great bodily harm, he may do so. Per Henry, C. J., and Norton and Ray, JJ. *Ib.*

43. ——: MANSLAUGHTER: INSTRUCTION. An instruction for manslaughter in the fourth degree, under Revised Statutes, sections 1249 and 1250, which would apply as well to manslaughter in the second degree, under Revised Statutes, section 1242, is incorrect. *Ib.*

44. ——: INSTRUCTION. An erroneous instruction is not cured by a subsequent one which properly declares the law. *Ib.*

45. ——: ——. An instruction which overstates the minimum punishment prescribed by law for an offence is erroneous. *Ib.*

46. ——: EVIDENCE: CHARACTER. Evidence of good character is always to be considered by the jury in making up their verdict as to the guilt or innocence of the accused, just like any other fact in the case, and no distinction is to be taken between evidence of facts and evidence of character. *Ib.*

47. ——: INSTRUCTION: REASONABLE DOUBT. An instruction defin-

ing a reasonable doubt to be a "real substantial doubt" condemned. *Ib.*

See PLEADING, CRIMINAL.

PRACTICE, CRIMINAL.

DAMAGES.

1. PERSONAL INJURY: MEASURE OF DAMAGES. In actions for personal injuries the amount of damages must be left largely to the reasonable discretion of the jury. It, however, is not at liberty to give any sum it pleases. *Waldhier v. The Hannibal & St. Joseph Ry. Co.*, 37.

2. ———: LIABILITY OF OFFICER FOR FALSE RETURN: DAMAGES. The fact that an order of publication intervened, in the regular course of practice in court, between a false return of *non est* to a summons by an officer and judgment by default, will not have the effect of shielding the officer from liability for the false return, and the loss suffered by the defendant, in consequence of an execution sale of his property under the judgment by default is a proper element of damages in an action by him against the sheriff for a false return. *The State ex rel. Kearney v. Finn*, 310.

3. DEATH OF PERSON FROM NEGLIGENCE: ASSESSMENT OF DAMAGES. On the trial of an action for the death of plaintiff's son, by reason of defendant's negligence, the jury can find the amount of the damages from the proof of the age of the deceased and the circumstances and condition in life of plaintiff. *Grogan v. The Broadway Foundry Co.*, 321.

4. DAMAGES: STATUTE: SECTION 2122. Section 2122 of the Revised Statutes only authorizes an action for damages where the death of the injured party was caused by the wrongful act of the party sued, and an action cannot be maintained where the death was only hastened by such wrongful act. *Jackson v. The St. Louis, Iron Mountain & Southern Ry. Co.*, 422.

DEEDS.

1. DEED, IMPROPER ACKNOWLEDGMENT OF. A deed, although acknowledged before a justice of the peace outside of the county in which the premises are located, is good between the parties. *Breckenridge v. The American Central Insurance Co.*, 62.

2. DEED, AUTHORITY OF PRESIDENT OF BANK TO MAKE. Under the evidence in this case held that the president of a bank had no authority to execute the bank's deed, conveying land for the benefit of creditors, and also that the authority of the president to make the deed in question could not be sustained on the ground of the bank's acquiescence therein. *McKeag v. Collins*, 164.

3. DEED, CONSTRUCTION OF: TRUSTEE: EQUITY. A deed construed and held to confer upon the wife of the grantor the absolute dominion in the property whenever she should exercise the power of disposition conferred in it; and also held that she had sufficiently exercised such power, and the trustee named in the deed was bound to convey the legal title, and that the trustee being absent from the state, and failing to do so, the land court of St. Louis, in the exercise of its chancery powers over trustees, properly divested the title out of the trustee, and vested it in the wife's appointee. *Hardy v. Clarkson*, 171.

4. DEED, DESCRIPTION IN. The description, "the south fractional one-fourth of northeast quarter of section 3, etc., containing eighteen acres," in a deed is sufficient to cover the southeast fractional one-fourth of the northeast quarter of section 3, where it appears that there is no other south fractional one-fourth of such quarter section containing eighteen acres. *Prior v. Scott*, 303.

5. DEED. The evidence in this case held sufficient to show the execution of a deed to plaintiff's ancestor, and its delivery by the grantor to the ancestor's agent for him. *Mason v. Black*, 329.

6. EQUITY: LOST DEED. Where title to land is vested in one by a deed which is lost or destroyed before being recorded, a court of equity will protect the rights of the grantee by divesting the grantor of any claim to the land, and by establishing the title in the grantee. *Ib.*

7. MUNIMENTS OF TITLE: NOTICE. The law imputes to a purchaser of land a knowledge of all facts relating to it appearing at the time of his purchase upon the muniments of title, which it was necessary for him to examine in order to ascertain the sufficiency of such title. *Ib.*

8. QUIT-CLAIM DEED: INNOCENT PURCHASER. One is not an innocent purchaser who, for a nominal consideration paid by him, accepts a quit-claim deed for land, and is informed at the time by the grantor therein, that he does not own the property and makes no claim to it. *Ib.*

9. ——: RECITALS: NOTICE. One who purchases land and takes the same under a chain of title containing a quit-claim deed of record, in which the grantor therein recites that "it is intended to convey by these presents all title of which I am vested at this day, and not to invalidate any sale heretofore made, if any exists," is put on inquiry by such recital as to the sufficiency of the quit-claim deed to pass the title to the land. *Ib.*

10. ——: ——: ——. Such quit-claim deed, it being of record, constructively notified all persons that the grantor therein was only conveying such title to the land as he had when he made the deed, and that, in his opinion, he had previously conveyed all his title. *Ib.*

11. DEED: DESCRIPTION OF PREMISES: PAROL EVIDENCE. While the deed to land must give a sufficient description of the premises intended to be conveyed, yet parol evidence is admissible to identify the land as existing on the ground where its locality is called in question. *Charles v. Patch*, 450.

12. ——: ——. Where land is conveyed in a deed by a given description, and it is shown to be known by the parties to the deed, and by the residents in the neighborhood by the description so used, the latter will be sufficient to pass the title. *Ib.*

13. DEED, ACKNOWLEDGMENT OF: EVIDENCE. A certificate of acknowledgment to a deed signed by the proper officer, and attested by his seal of office, is *prima facie* true, and the evidence to overthrow it must be clear and satisfactory. *Webb v. Webb*, 540.

14. ——: PRIVY EXPLANATION. It is not required that the contents of a deed should be explained to a married woman, separate and apart from her husband, by the officer taking her acknowledgment of the same. Affirming *Belo v. Mayes*, 79 Mo. 67. *Ib.*

DEMURRER.

See PRACTICE, CIVIL, 2.

DEPOSITIONS.

1. DEPOSITION: ADMISSION. The deposition of a party to a cause may be read in evidence against him in another cause as an admission, but it cannot be so read in the same cause in which it is taken. *Priest v. Way*, 16.

2. EVIDENCE: DEPOSITION: FORM OF QUESTION: OBJECTION: PRACTICE. Objection cannot be made on the trial to the reading of a deposition, merely because the questions are leading, when no such objection was made at the time of taking the deposition, where the evidence itself is competent. The competency and relevancy mentioned in Revised Statutes, section 2159, relate only to the substance of the evidence, and not to the form of the questions. *Patton v. The St. Louis & San Francisco Railway Co.*, 117.

DESCRIPTION.

See DEED, 4.

DEVISE.

See WILLS, 3.

DOWER.

1. LIMITATIONS: DOWER. The statute of limitations will not begin to run against the heirs so long as the widow has the right to the possession of land. *Roberts v. Nelson*, 229.

2. HUSBAND AND WIFE: DOWER, CONTRACT IN LIEU OF. It is against public policy to allow a man by an agreement before marriage, which does not secure to the wife after his death a provision for her support during her life, to bar her right to dower. *Mowser v. Mowser*, 437.

DRAMSHOP LICENSE.

See PROHIBITION.

DYING DECLARATION.

See CRIMINAL LAW, 16, 17.

EJECTMENT.

1. EJECTMENT: TAX SALE: REAL ESTATE OF WIFE. A wife's interest in her real estate belonging to her before her marriage is not affected by a tax suit and sale to which she was not a party, and the purchaser at such sale cannot recover in an action of ejectment against her tenant, although the husband was a party to the tax suit. *Gitchell v. Messmer*, 131.

2. EJECTMENT: PRIOR POSSESSION: TRESPASS. In actions of ejectment recovery on prior possession is generally limited to cases where the defendant is a mere intruder or trespasser, and does not extend to cases where he is in possession under color and claim of title. *Prior v. Scott*, 304.

3. ——: ——: PRESUMPTION. Where the prior possessor has been turned out by an opposing claimant in judicial proceedings, all presumptions in the former's favor, growing out of said prior possession, if not terminated, are, at least, shifted in favor of his successful opponent. *Ib.*

4. EJECTMENT: COMMON GRANTOR. In ejectment, where both parties claim under a common source of title, the plaintiff need not show that the title of the common grantor is the legal title. *Charles v. Patch*, 450.

5. LAND TITLE: ADVERSE POSSESSION: EJECTMENT. One who incloses and holds land by an open, notorious, adverse possession, against all the world, for a period of ten years will obtain thereby an indefeasible title in fee-simple to the land so inclosed and possessed. *Ekey v. Inge*, 493.

6. PRACTICE: EJECTMENT: JUDGMENT. A judgment in ejectment is no bar to a second action between the same parties for the same property, whether the titles and defences in both cases be the same or not. *Ib.*

7. PARTITION: JUDGMENT: EJECTMENT. A judgment in partition establishes the title to the land which is the subject of the partition suit and in an action of ejectment upon an adverse possession or an adverse title, existing at the date of the partition, it is final and conclusive upon all parties to the record. *Holladay v. Langford*, 577.

8. EJECTMENT, ACTION OF PUTS WHAT IN ISSUE: TITLE: POSSESSION. In a statutory action of ejectment all the constituent elements of title are involved, including possession, right of possession, and right of property, and this puts in issue all the means and documents which evidence and establish the right of plaintiffs to recover. *Chapman v. Dougherty*, 617.

9. ——: EVIDENCE: WITNESS. In an action of ejectment by the devisee of land whose testator held under a deed from defendant, the latter is incompetent to testify as to the non-delivery of such deed. R. S., sec. 4010. *Ib.*

ELECTIONS.

1. CONTESTED ELECTION: MAYOR OF ST. LOUIS CITY. The general assembly has made no provision for the contest in the courts of the right to the office of mayor of the city of St. Louis. *The State ex rel. Francis v. Dillon*, 487.

2. ——: ——: REVISED STATUTES, SECTION 5528. The words, "county officers," in Revised Statutes, section 5528, which provides that "the several circuit courts shall have jurisdiction in cases of contested elections of county officers," held not to include or apply to a contest for the office of mayor of the city of Saint Louis. *Ib.*

EQUITY.

1. DEED, CONSTRUCTION OF: TRUSTEE: EQUITY. A deed construed and held to confer upon the wife of the grantor the absolute dominion in the property whenever she should exercise the power of disposition conferred in it; and also held that she had sufficiently exercised such power, and the trustee named in the deed was bound to convey the legal title, and that the trustee being absent from the state and failing to do so, the land court of St. Louis, in the exercise of its chancery powers over trustees, properly divested the title out of the trustee, and vested it in the wife's appointee. *Hardy v. Clarkson*, 171.

2. DEVISE: EQUITABLE LIEN. Where real estate is devised to one who is, by the will, required to pay to each of the other devisees named in the will a sum sufficient to make the devises to all equal in value

the law in such cases will attach an equitable lien on the land for the sums so required to be paid. *Dudgeon v. Dudgeon*, 218.

3. EQUITY: LOST DEED. Where title to land is vested in one by a deed which is lost or destroyed before being recorded, a court of equity will protect the rights of the grantee by divesting the grantor of any claim to the land, and by establishing the title in the grantee. *Mason v. Black*, 329.

4. ——: CLOUD ON TITLE. A suit to remove a cloud on title cannot be maintained when the defect appears on the face of the conveyances through which the opposite party claims title. But when such claim of title is valid upon the face of the conveyances, and the defect can only be made apparent by extrinsic evidence, particularly if that evidence depends on oral testimony to establish it, a case is made for a court of equity to remove the cloud from the title. *Ib.*

5. ——: ——. The rule that one not in possession cannot maintain a suit in equity to quiet title, or to remove a cloud therefrom, applies where the complainant has the legal title, because he may then bring ejectment for possession. But where the complainant has only the equitable title, and the legal title is in the occupant, it is otherwise. In the latter case, the complainant being unable to sue at law, because he is without the legal title, must assert his rights in a court of equity. *Ib.*

6. EQUITABLE TITLE: STATUTE. In such equitable suit, the court may, under the statute (R. S. sec. 3692), pass the title to plaintiff without any act to be done by defendant, and may also (R. S., sec. 3693), issue a writ of possession to put the former in possession. *Ib.*

7. EQUITY: MISTAKE OF LAW. A court of equity will not relieve against a mistake of law, unmixed with a mistake of fact. *Price v. Estill*, 378.

8. ——: SETTING ASIDE DEED OF TRUST. A trustee of an estate, held under a will in trust for the testator's children, without authority therefor, encumbered land belonging to it with a deed of trust to secure a loan made to him individually and afterwards took credit for the amount of the loan against the children in his settlement as their guardian. *Held*, that in an action by the wards to cancel the deed of trust, because made without the authority of the will, they would not be required as a condition for the relief sought to refund the amount of the loan to the purchaser under the deed of trust. *Ib.*

EQUITY: INJUNCTION: CLOUD UPON TITLE: ADVERTISEMENT: RECEIVER: TRUSTS AND TRUSTEES, *Ohnsorg v. Turner*, 127.

ESTOPPEL.

1. INSURANCE: INCUMBRANCE: ESTOPPEL. Where the agent who effects insurance is apprized of the existence of an incumbrance on the property, the company is estopped to complain that such fact is a

breach of a warranty contained in the policy. *Breckinridge v. The American Central Insurance Company*, 62.

2. CORPORATION: ESTOPPEL. A person who deals with a corporation is estopped to deny its legality or incorporation. *Broadwell v. Merritt*, 95.

3. THE RULE APPLIED to a case where one, for a valuable consideration, made a deed of real estate to the "German Building Association of Kansas City" as grantee before its articles of incorporation were filed with the secretary of state. *Ib.*

4. PRIVITY: ESTOPPEL. One who holds under said grantor by subsequent conveyances, which are in effect quit-claim deeds, is in no better position than such grantor. He is in privity with and bound and estopped by the facts which estop said grantor. *Ib.*

5. ESTOPPEL: ACTION FOR RESTITUTION OF PROCEEDS OF SALE UNDER JUDGMENT AFTERWARDS REVERSED. A plaintiff in an execution, when sued by the defendant therein for the restitution of the proceeds of the execution sale, because of the subsequent reversal of the judgment in the Supreme Court, will be estopped to claim in bar of such restitution that the defendant in the execution, before sale thereunder, conveyed the premises to a third person. *Griffith v. Randolph*, 260.

6. ——: ——. Nor will it be a good defence for the defendant in the restitution suit, that the first case, which was to enforce a vendor's lien, is pending on a second appeal to the Supreme Court, and that the plaintiff in the restitution suit is insolvent, and the defendant therein is, therefore, entitled to retain the proceeds of the execution sale until the second appeal in the original suit is determined, it appearing that such insolvency, if a fact, was caused by the act of the defendant in the restitution suit in selling the property of the plaintiff therein under a judgment afterwards decided by the Supreme Court to be erroneous. *Ib.*

7. HUSBAND AND WIFE: PARTIES: ESTOPPEL: WITNESS. Where a wife assists her husband in the conduct of a newspaper, and they, as partners, have mutual dealings with a third party, she is *prima facie*, at least, entitled to be joined with the husband in a suit against such party for a debt due the paper, and where, in such suit, defendant receives the benefit of an off-set as against both husband and wife, he will be estopped to complain as to misjoinder of parties: and the wife, having a substantial interest in the controversy, is competent to testify in the cause. *Dunifer v. Jecko*, 282.

8. ESTOPPEL. One claiming title to land under an executory contract is estopped to deny its validity. *Rollins v. McIntire*, 496.

EVIDENCE.

1. DEPOSITION: ADMISSION. The deposition of a party to a cause may be read in evidence against him in another cause as an admission.

but it cannot be so read in the same cause in which it is taken. *Priest v. Way*, 16.

2. EVIDENCE: POSSESSION. The possession of a check is *prima facie* evidence of its ownership by the holder. *Ib.*

3. ——: BURDEN OF PROOF. The burden of proving the fraudulent abstraction of money is on him who alleges it. *Ib.*

4. THE EVIDENCE IN THIS CASE reviewed and the charge of fraudulent abstraction and conversion of moneys belonging to plaintiff's estate held not made out by the evidence. *Ib.*

5. ——: PLEADING: PRACTICE. Under the statute (R. S., sec. 3553), mitigating circumstances may be pleaded in an action for slander, and are admissible in evidence to reduce the amount of damages, but not to defeat the action. *Trimble v. Foster*, 49.

6. ——: PRACTICE. Evidence of defendant's condition and circumstances in life is admissible in an action for slander. *Ib.*

7. ——: INSOLVENCY: COMMON REPORT. Common report of a person's insolvency is admissible upon the issue whether another knew of such insolvency, or had reasonable ground to believe it. *Gordon v. Ritenour*, 54.

8. ——: COMMON REPORT. Common report of one's intention to defraud his creditors in incumbering his property is not admissible to charge another with knowledge of such purpose. *Ib.*

9. ——. Where the vendor of property remains in possession openly as the lessee of the vendee, making no claim to the ownership of the property, his declarations as to such possession are inadmissible against the vendee. *Ib.*

10. ——, The defendant, in an action against it on a policy of insurance for the destruction of a house by fire, cannot complain of the rejection of testimony, even conceding it to have been comcompetent, that the house was in bad repute, and had the reputation of being a bawdy house, where such evidence was offered only as affecting the value of the house, and the defendant's own evidence shows that its value was greater than that found by the jury. *Breckinridge v. The American Central Insurance, Co.*, 62.

11. ——: PROOF OF LOSS. The objection to the introduction in evidence of the proof of loss, because it was not signed by the plaintiff, is untenable, where it appears that his name was signed to the affidavit, at his instance, and in his presence, by another, and was adopted by plaintiff as his signature, and who was also sworn as to the matters set forth in the affidavit. *Ib.*

12. ——: ——. The proof of loss is only evidence of the fact that

it was furnished to the company, and is not evidence of the loss itself. *Ib.*

13. ———. Evidence as to the validity of a tax deed may be admitted subject to its legal effect being controlled by proper instructions. *Cobb v. The Griffith & Adams Sand, Gravel and Transportation Company*, 90.

14. ———: DEPOSITION: FORM OF QUESTION: OBJECTION: PRACTICE. Objection cannot be made on the trial to the reading of a deposition, merely because the questions are leading, when no such objection was made at the time of taking the deposition, where the evidence itself is competent. The competency and relevancy mentioned in Revised Statutes, section 2159, relate only to the substance of the evidence, and not to the form of the questions. *Patton v. The St. Louis & San Francisco Ry. Company*, 117.

15. RAILROAD: NEGLIGENCE: ESCAPE OF FIRE: EVIDENCE. In an action against a railroad company for negligently suffering its right of way to become covered with dry grass, etc., and negligently permitting fire to escape from one of its passing locomotives, which fire was communicated to plaintiff's premises, and his property thereby destroyed, after plaintiff has offered evidence tending to support the allegations of the petition, it is permissible for the defendant to offer testimony going to show that the engineer and fireman were competent and careful, and that the locomotive was of a new and approved make, was supplied with a good spark arrester, and had been properly inspected. *Ib.*

16. ———: ———: ———: ———. Where there is no dispute as to the identity of the locomotive from which fire escaped and communicated to plaintiff's premises, it is competent to show that the same locomotive, on the same trip, and about the same time and place, set out other fires in its passage, as raising an inference of some weight that there was something unsuitable in its construction or management. *Ib.*

17. SUIT TO QUIET TITLE: STATUTE: EVIDENCE. In an action under Revised Statutes, sections 3562 and 3563, to quiet title to land, evidence offered by the plaintiff that he is the owner in fee is properly excluded. It is sufficient for him to show that he is in the actual possession of the property, claiming either an estate of freehold, or an unexpired term of not less than ten years. *Dyer v. Baumeister*, 134.

18. RAILROAD: KILLING STOCK: EVIDENCE. In an action against a railroad company for double damages for killing stock, proof that the animal was killed at a point a quarter of a mile from the depot, beyond the switch limits, where the road was fenced on one side, but not on the other, is, *prima facie*, sufficient to show that the killing did not occur within the limits of an incorporated town, or at a public crossing. *Lepp v. The St. Louis, Iron Mountain & Southern Railway Company*, 139.

19. ———: ———: ———. It need not be shown, by direct evidence

where the animal strayed upon the railroad track. Proof that it was killed at a point where there was no fence, but where the company was in duty bound to fence, is sufficient to take the case to the jury. *Ib.*

20. ——: EVIDENCE; REPUTATION. It is error to allow a witness to testify as to one's general reputation without first laying the proper foundation by showing that the witness is acquainted with such reputation. *The State v. Brady*, 142.

21. EVIDENCE. Declarations of a conspirator, made after the conclusion of the common enterprise are inadmissible against a co-conspirator. *The State v. McGraw*, 161

22. ——: ANCIENT DEED, PRESUMPTION: POSSESSION. An ancient deed, or other instrument, having nothing suspicious about it, is presumed genuine without express proof, and if found in the proper custody may be read in evidence, without proof of possession of the land conveyed. *Long v. McDow*, 197.

23. DECLARATIONS: PRIVIES IN BLOOD AND ESTATE. The declarations of one as to his manner of acquiring land and the name under which he acquired it are binding upon privies in blood and estate claiming under him. *Ib.*

24. EVIDENCE: IDENTITY OF NAME AND PERSON. Identity of name is *prima facie* evidence of identity of a person. *Ib.*

25. ——: ADMISSION. A party is not bound to accept in evidence an admission in lieu of a record, when the admission is not broad enough to embrace all the facts disclosed by the record, and the parol admission of a party, made *in pais*, is competent evidence only of those facts which may lawfully be established by parol evidence, and cannot be received to supply the place of existing evidence by matter of record. *Bank of North America v. Crandall*, 208.

26. RECORD EVIDENCE: FRAUD. A decree, admissible in evidence as tending to show that a debt was fraudulently contracted, loses none of its probative force and conclusiveness because entered long after the debt was created, and the note evidencing it was executed. *Ib.*

27. SPECIFIC PERFORMANCE: EVIDENCE. In a suit for the specific performance of a contract for the purchase of land, the evidence of the agreement should be reasonably certain and satisfactory. *Tedford v. Trimble*, 226.

28. EVIDENCE: STATUTE. No instrument of writing executed by a person since deceased can, under Revised Statutes, section 3654, be received in evidence in a suit against the administrator of the deceased, without proof of its execution. *Julian v. Rogers*, 229.

29. TRUST IN LANDS, EVIDENCE TO ESTABLISH. In order to establish by

parol a trust in lands the evidence must be so cogent as to leave no room for reasonable doubt in the mind of the chancellor. *Rogers v. Rogers*, 257.

30. CRIMINAL LAW: EVIDENCE: CLOTHING WITH BLOOD STAINS. On a trial for homicide, it is proper to admit in evidence, and to permit the jury to inspect clothing worn by the accused on and soon after the day of the commission of the crime, and having thereon blood stains. The fact that such garments cannot be filed with the bill of exceptions is no reason for excluding them, the descriptive evidence being sufficient to enable the court to pass upon the competency of the evidence. *The State v. Stair*, 268.

31. ——: ——: IDENTITY OF HANDWRITING. A paper, claimed to be in the handwriting of the defendant, is sufficiently proved to go to the jury, where a witness called to identify it testifies that he had seen defendant write two or three notes and sign his name to another, that he thought he could tell defendant's handwriting, and that he judged the paper shown him, and afterwards read in evidence, was in defendant's handwriting; that he was not positive, but so judged from a comparison of the writing with his memory of what defendant wrote. *Ib.*

32. EVIDENCE: WRITING FOUND IN POSSESSION OF ACCUSED. Where one of two joint defendants was arrested for murder, there was found, in a pocket-book in his possession, a paper with the following words in his handwriting: "Do you think it safe to kill them and wrap them up in the clothes and tell that they went off in a buggy." *Held*, that this writing was competent evidence against said defendant, in whose possession it was found, the proof tending to show that he acted on the suggestion contained therein. *Ib.*

33. ——: ——. Such writing, however, was not competent as against the other defendant, the wife of the one in whose possession it was found, it not being shown by the state when it was written, or that she had any knowledge of it, and it not being proved to be a part of the *res gestae*. *Ib.*

34. ——: EVIDENCE. Under a claim that a certain street marks a boundary line, it is error to admit in evidence proceedings to open such street, the judgment in which had been vacated for want of jurisdiction. *The City of St. Louis v. Meyer*, 276.

35. ——: EVIDENCE: DEED. A deed made by one of the parties twelve years before the deed in suit was made, is incompetent to show that the former deed was made under the survey adopted in the latter deed. *Ib.*

36. DEED. The evidence in this case held sufficient to show the execution of a deed to plaintiffs' ancestor, and its delivery by the grantor to the ancestor's agent for him. *Mason v. Black*, 329.

37. JUDGMENT: EVIDENCE: ATTACHMENT: GARNISHEE. A judgment for or against a garnishee in an action of attachment by one creditor

is not binding upon another creditor in an attachment suit by him against the same garnishee, and the record of the judgment in the former case is not admissible in evidence on the trial of the latter. *Strauss v. Ayres*, 348.

38. PRACTICE: EVIDENCE. In an action upon a contract to make satisfactory repairs upon a certain reaper for the harvest of 1882, evidence that the defendant used such a reaper in the harvest of 1881, and expressed himself satisfied with it, is inadmissible. *Feurth* v. *Anderson*, 354.

39. EVIDENCE. It is better for the witnesses, where the possession of personal property is controverted, to state the facts bearing on such question, but where they state simply that one party was in possession and no effort is made by the other party, by cross-examination or otherwise, to have the particular facts relating to such possession detailed, the judgment will not be reversed because of the admission of the evidence in the objectionable form. *McMillan* v. *Schweitzer*, 402.

40. CRIMINAL LAW: EVIDENCE: DYING DECLARATIONS. Dying declarations, to be admissible in evidence, must have been made in apprehension of death, after all hope of life had been abandoned, and must be restricted to the identification of the accused and the deceased, and to the act of killing and the circumstances immediately attending it and forming a part of the *res gestae*. *The State* v. *Chambers*, 406.

41. ——: ——: ——. Dying declarations constituting a mere expression of opinion or belief are inadmissible in evidence. *Ib.*

42. ——: DECLARATION OF LANDLORD: EVIDENCE. In an action for rent the landlord is not bound by a promise that he will not claim the rent where no consideration for such promise is alleged or proved, and it is inadmissible in evidence. *Haseltine v. Ausherman*, 410.

43. ANTE-NUPTIAL AGREEMENT: CONSIDERATION: EVIDENCE. A parol ante-nuptial agreement between husband and wife, that, upon the death of either, the other should claim no interest in the estate of the deceased, is not admissiole against the widow in a suit by her for the allowance given her by Revised Statutes, section 107, where she has received nothing as a consideration for the alleged agreement. *Mowser* v. *Mowser*, 437.

44. DEED: DESCRIPTION OF PREMISES: PAROL EVIDENCE. While the deed to land must give a sufficient description of the premises intended to be conveyed, yet parol evidence is admissible to identify the land as existing on the ground where its locality is called in question. *Charles v. Patch*, 450.

45. ——: ——. Where land is conveyed in a deed by a given description, and it is shown to be known by the parties to the deed, and by the residents in the neighborhood by the description so used, the latter will be sufficient to pass the title. *Ib.*

46. THE OBJECTION that a city plat referred to in a deed was not properly offered in evidence, *held*, not well taken. *Ib.*

47. WILL: UNDUE INFLUENCE: EVIDENCE. On the trial of an issue whether or not a will was made under undue influence, declarations of the alleged testator, made before and after its execution, are inadmissible as evidence of the facts mentioned in such declarations. *Bush* v. *Bush*, 480.

48. ——: ——: ——. Such declarations are only admissible when the condition of the testator's mind is the point of contention, or it becomes material to show the state of his affections, and they are then received as external manifestations of his mental condition, and not as evidence of the truth of the facts referred to in the declarations. *Ib.*

49. EVIDENCE. The declarations of a legatee and a co-defendant, tending to show that she exercised undue influence on the mind of the testator, are not admissible where the petition does not charge her with its exercise. *Ib.*

50. DEED, ACKNOWLEDGMENT OF: EVIDENCE. A certificate of acknowledgment to a deed signed by the proper officer, and attested by his seal of office, is *prima facie* true, and the evidence to overthrow it must be clear and satisfactory. *Webb v. Webb*, 540.

51. EVIDENCE: DECLARATIONS OF AGENTS. Declarations of a servant are not competent evidence against a master, unless made while the former is transacting the business of the latter; they must be co-incident with the events to which they relate, and not narratives of what has passed. *Devlin v. The Wabash, St. Louis & Pacific Railway Co.*, 545.

52. ——: EVIDENCE: THREATS. Evidence of threats, general or special, or verbal indications of a similar nature, of the intended commission of a wrongful or criminal act, is admissible in both civil and criminal cases. *Culbertson v. Hill*, 553.

53. EVIDENCE: PAYMENT OF TAXES. The assessment to a party and payment by him of taxes are evidence on the question of the good faith of another in entering upon land under color of title, in the light of other circumstances tending to show a disclaimer of title by the latter. *Gaines v. Saunders*, 557.

54. PRACTICE: EVIDENCE. It is error to admit incompetent testimony which has a tendency to corroborate a party in an immaterial and unimportant particular, and to draw away the minds of the jurors from the point in issue. *Ritter v. The First National Bank of Springfield*, 574.

55. EVIDENCE: NOTORIETY. Proof of the notoriety of a fact is competent to show notice or knowledge of it by another. *Crane v. The Missouri Pacific Railway Co.*, 588.

56. ——: ——. Evidence to show that a car used by the defendant, a railroad, and known as the Baldwin locomotive car, because of its dangerous character, had been abandoned by the defendant, and by railroads generally, is competent to show knowledge, on the part of defendant, of such dangerous character of the car. *Ib.*

57. ——: IMPEACHING WITNESS. A party introducing a witness cannot impeach his testimony, either by general evidence showing his bad character for truth, or by proof of statements made out of court contradictory of his testimony. *Dunn v. Dunnaker*, 597.

58. ——: ——. The above rule does not apply where the party was entrapped into offering the witness, or it was brought about by imposition or surprise. *Ib.*

59. CRIMINAL LAW: FLIGHT OF ACCUSED. The flight of one charged with crime is a circumstance tending to prove guilt, and should be considered by the jury, and an instruction of the court to that effect is proper. *The State v. Griffin*, 608.

60. ——: EVIDENCE. On a trial for murder it is not competent for the defendant to testify as to his belief and apprehension of bodily harm and danger when he killed the deceased. *The State v. Gonce*, 627.

61. ——: IMPEACHING WITNESS. Where it is sought to impeach a defendant who testified as a witness, by offering to read in evidence his statements contained in an affidavit for a continuance, a sufficient foundation is laid for its introduction when it is shown to defendant, and he admits he signed and swore to it, although he was not examined as to its contents. *Ib.*

62. ——. The record in this case held to sufficiently show that the judge who presided at the trial, and who was the judge of another circuit, had the authority to try the cause. *Ib.*

63. EVIDENCE: IDENTITY OF NAMES. Identity of name of witness with that contained in a record of a conviction of an offence creates a *prima facie* presumption of identity of person. *The State v. McGuire*, 642.

64. CRIMINAL LAW: EVIDENCE: THREATS. On a trial for homicide, evidence of threats should not be rejected because of their vagueness or the obscurity of language in which they are couched, and the threats of deceased, made fifteen minutes before his death, that he "was going to have blood before morning," are properly admitted upon the trial of one charged with his murder, as tending to show that the deceased was the aggressor. *The State v. McNally*, 644.

65. ——: ——: ——. The nearness or remoteness of threats to the date of the commission of the crime does not affect their admissibility or competency. *Ib.*

66. ——— : ——— : CHARACTER. Evidence of good character is always to be considered by the jury in making up their verdict as to the guilt or innocence of the accused, just like any other fact in the case, and no distinction is to be taken between evidence of facts and evidence of character. *Ib.*

67. EVIDENCE : JUDGMENT OF SISTER STATE. A judgment, purporting to be rendered in the county of Adams, state of Illinois, before Joseph Sibley, judge of the tenth judicial circuit, and attested by the clerk of the sixth judicial circuit, and the attestation certified to be in due form by Judge Williams, as judge of the sixth judicial circuit, held, properly admissible in evidence. *Taylor v. Heitz*, 660.

68. ——— : ———. The difference in the numbering of the judicial circuits, which are subject to legislative changes, is not material in connection with the other facts affirmatively appearing, and it sufficiently appears that Judge Sibley was judge of the circuit court held in Quincy, Adams county, Illinois, where the judgment was rendered. *Ib.*

69. ——— : SECONDARY EVIDENCE. Proof by oral evidence of the previous conviction of a witness of a crime is competent if such evidence is not objected to. *The State v. Rockett*, 666.

See MORTGAGES AND DEEDS OF TRUST, 2.

EXECUTIONS.

1. CORPORATION : STOCKHOLDER, WHEN EXECUTION MAY ISSUE AGAINST : STATUTE. Under Revised Statutes, section 736, where execution has issued against a corporation and been returned *nulla bona*, the judgment creditor may, upon order of the court in which the suit shall have been instituted, made upon motion in open court, after sufficient notice, have execution against any stockholder to the extent of the amount of such stockholder's unpaid balance on his stock. *Paxon v. Talmage*, 13.

2. ——— : ——— : ———. The proceeding authorized by Revised Statutes, section 736, is not an original one, but supplemental to a prior proceeding in the same court which resulted in a judgment against the corporation followed by a barren execution. *Ib.*

3. ——— : PLEADING : PRACTICE. A petition in a cause which does not ask for judgment against defendant as a stockholder, but only for an order for execution against him on the basis of a judgment already obtained against his corporation in another court, can only be treated as a motion for an order for an execution, under Revised Statutes, section 736, and must fail because not filed in the court where the judgment was obtained. *Ib.*

4. ——— : EXECUTION. In an action by an execution debtor against the sheriff and his sureties for the value of property exempt from

execution, levied upon and sold by the sheriff, the latter may contradict his return by showing that the property so levied upon and sold was, in fact, that of the plaintiff in the execution, and was by mistake so levied upon and sold. Such contradiction cannot revive the debt extinguished by the sale of the property and the application of the proceeds to the credit of the execution debtor, nor can the debt thus extinguished ever be revived in any collateral proceeding against the debtor. The execution debtor will not be allowed to extinguish his debt by a sale of the execution creditor's property and afterwards also recover the value of the property. *Decker v. Armstrong*, 316.

EXECUTIONS, LAW OF 1849 RELATING THERETO. Under the act of 1849 (Laws, 1849, p. 92), in relation to executions, an execution could issue after five years from entry of judgment only by leave of court, and such leave must be shown affirmatively to support a sheriff's sale under an execution issued while that act was in force upon a judgment so entered five years previously. *Rollins v. McIntire*, 496.

FELLOW SERVANTS.

See MASTER AND SERVANT, 7. 11.

PLEADING, 10.

FENCES.

See RAILROADS, 34, 35.

FIXTURES.

——: FIXTURES. A mortgage of a stock of goods and store fixtures, although void as to creditors because the grantor was permitted to remain in possession and dispose of the merchandise for his own use, will not, for that reason, be invalid as to the fixtures. *Bullene v. Barrett*, 185,

FRAUD.

ACTUAL FRAUD: PROOF OF. Actual fraud must be proved, not conjectured. Facts which give rise only to suspicion of its existence do not establish it. *Priest v. Way*, 16.

——: BURDEN OF PROOF. The burden of proving the fraudulent abstraction of money is on him who alleges it. *Ib.*

——: COMMON REPORT. Common report of one's intention to defraud his creditors in incumbering his property is not admissible to charge another with knowledge of such purpose. *Gordon v. Ritenour*, 54.

4. FRAUD IN CREATION OF DEBT: DISCHARGE IN BANKRUPTCY. Where worthless and fraudulent bonds are knowingly given as security for a debt at the time of its creation, this will constitute such fraud as will bring the case within the exception of the bankrupt act, and prevent a discharge in bankruptcy from operating as a bar to a recovery for the debt. *Bank of North America v. Crandall*, 208.

5. FRAUD. Where one intentionally misrepresents a material fact, or produces a false impression in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him, it will constitute positive or actual fraud in the truest sense of the terms. And the misrepresentation is not confined to words, or positive assertions, but may consist of deeds, acts, or artifices to mislead. *Ib.*

6. FRAUD AFTER CREATION OF DEBT. Where the fraud occurred long after the creation of the debt, and at the time of the execution of a note evidencing the debt, it will not come within the purview of the bankrupt act. *Ib.*

7. RECORD EVIDENCE: FRAUD. A decree, admissible in evidence as tending to show that a debt was fraudulently contracted, loses none of its probative force and conclusiveness, because entered long after the debt was created, and the note evidencing it was excuted. *Ib.*

8. FRAUDS: TRUSTS. Frauds and trusts are not within the statute of frauds. *Rogers v. Rogers*, 257.

9. FRAUD: PRACTICE: PRESUMPTION. Where a petition charges fraud, but the decree of the court is silent on that issue, it will be presumed that the trial court did not think the charge sustained by the evidence. *Scheppelmann v. Feurth*, 351.

10. FRAUDULENT CONVEYANCE: INNOCENT PURCHASER. A *bona fide* purchaser for a valuable consideration from a fraudulent grantor is not affected by the fraud of the latter. But he must be a *bona fide* purchaser as well as one for a valuable consideration to be so protected. *Craig v. Zimmerman*, 475.

11. ——: ——. A purchaser with notice may protect himself by purchasing the title of a *bona fide* purchaser for a valuable consideration without notice. *Ib.*

12. ——: ——. A purchaser without notice of the fraud may sell and convey a good title to one having notice, and the quit-claim deed of the former, where the property was subject to no equities in his hands, will pass whatever title he had. *Ib.*

FRAUDULENT CONVEYANCE.

1. FRAUDULENT CONVEYANCE. A fraudulent conveyance will not be set aside at the instance of creditors to the prejudice of a *bona fide* purchaser from a fraudulent grantee. *Gordon v. Ritenour*, 51.

2. FRAUDULENT CONVEYANCE: INNOCENT PURCHASER. A *bona fide* purchaser for a valuable consideration from a fraudulent grantor is not affected by the fraud of the latter. But he must be a *bona fide* purchaser as well as one for a valuable consideration to be so protected. *Craig* v. *Zimmerman*, 475.

3. ——: ——. A purchaser with notice may protect himself by purchasing the title of a *bona fide* purchaser for a valuable consideration without notice. *Ib.*

4. ——: ——. A purchaser without notice of the fraud may sell and convey a good title to one having notice, and the quit-claim deed of the former, where the property was subject to no equities in his hands, will pass whatever title he had. *Ib.*

GARNISHMENT.

See ATTACHMENT, 2.

GENERAL LAW.

1. ——: GENERAL LAW. The act of the legislature of March 11, 1885 (Acts 1885, p. 63), authorizing any city containing more than twenty thousand, and less than two hundred and fifty thousand inhabitants, existing by virtue of special or local laws, to extend its limits, etc., is a general law, and is therefore not within the inhibitions of the constitution against the enactment of special or local laws for the regulation of cities and towns. *Kelly v. Meeks*, 396.

2. ——: LAW AUTHORIZING CITIES TO EXTEND THEIR LIMITS. While such acts conferring on cities the power to extend their limits are constitutional and valid, yet the power so conferred must be reasonably and properly exercised. *Ib.*

GRAND JURY.

See CRIMINAL LAW, 23.

HANDWRITING.

See EVIDENCE, 31, 32, 33.

HUSBAND AND WIFE.

1. EJECTMENT: TAX SALE: REAL ESTATE OF WIFE. A wife's interest in her real estate belonging to her before her marriage is not affected by a tax suit and sale to which she was not a party, and the purchaser at such sale cannot recover in an action of ejectment against her tenant, although the husband was a party to the tax suit. *Gitchell v. Messmer*, 131.

2. MARRIED WOMAN, RIGHT OF TO CONTRACT AS TO SEPARATE PROPERTY. A married woman has the power to contract with respect to her separate property, and she may own property with her husband, and with others. *Dunifer v. Jecko*, 282.

3. HUSBAND AND WIFE: PARTIES: ESTOPPEL: WITNESS. Where a wife assists her husband in the conduct of a newspaper, and they, as partners, have mutual dealings with a third party, she is *prima facie*, at least, entitled to be joined with the husband in a suit against such party for a debt due the paper, and where, in such suit, defendant receives the benefit of an off-set as against both husband and wife, he will be estopped to complain as to misjoinder of parties; and the wife, having a substantial interest in the controversy, is competent to testify in the cause. *Ib.*

4. ANTE-NUPTIAL AGREEMENT: CONSIDERATION: EVIDENCE. A parol ante nuptial agreement between husband and wife, that, upon the death of either, the other should claim no interest in the estate of the deceased, is not admissible against the widow in a suit by her for the allowance given her by Revised Statutes, section 107, where she has received nothing as a consideration for the alleged agreement. *Mowser v. Mowser*, 437.

5. HUSBAND AND WIFE: DOWER, CONTRACT IN LIEU OF. It is against public policy to allow a man by an agreement before marriage, which does not secure to the wife after his death a provision for her support during her life, to bar her right to dower. *Ib.*

IDEM SONANS.

1. EVIDENCE: IDENTITY OF NAME AND PERSON. Identity of name is *prima facie* evidence of identity of person. *Long v. McDow*, 197.

2. ———: IDENTITY OF NAMES. Identity of name of witness with that contained in a record of a conviction of an offence creates a *prima facie* presumption of identity of person. *The State v. McGuire*, 642.

INCUMBRANCES.

See COVENANT AGAINST INCUMBRANCES.

INDICTMENT.

See PLEADING, CRIMINAL.

INJUNCTION.

1. INJUNCTION: COSTS. Where one is enjoined from prosecuting his business, dispossessed of his property, and a receiver appointed to take charge, at the plaintiff's instance, the compensation for the

receiver's services is taxable as costs against the plaintiff, the losing party. *The City of St. Louis v. The St. Louis Gas Light Co.*, 223.

9. JUDGMENT, WHEN A BAR: INJUNCTION. While a cause of action, when prosecuted to judgment, becomes merged in the judgment, and such judgment is a bar to a second prosecution of the same cause of action, yet it is competent for the parties to agree that such judgment may be set aside and enjoined, upon condition that it shall not affect the right of the plaintiff therein to prosecute a suit on his original cause of action, which formed the basis of the judgment. *Wilson v. The St. Louis, Iron Mountain & Southern Ry. Co.*, 431.

EQUITY: INJUNCTION: CLOUD UPON TITLE: ADVERTISEMENT: RECEIVER: TRUSTS AND TRUSTEES. *Ohnsorg v. Turner*, 127.

INNOCENT PURCHASER.

TOWN PLAT: INNOCENT PURCHASER. The fact that a town plat was not recorded will not defeat the title of one purchasing a lot, in ignorance of such want of record. *Rollins* v. *McIntire*, 496.

See LAND AND LAND TITLES, 10, 18, 19, 20.

INSOLVENCY.

See EVIDENCE, 7.

INSTRUCTIONS.

1. INSTRUCTIONS. A cause will not be reversed by reason of erroneous instructions which could not have prejudiced the appellant. *Breckinridge v. The American Central Insurance Co.*, 62.

2. ——. An instruction should not be given which singles out one statement in evidence and directs a verdict on the truth of such statement in disregard of the other evidence. *Spohn v. The Missouri Pacific Railway Co.*, 74.

3. ——. An instruction is erroneous which assumes the existence of a fact. *Bank of North America v. Crandall*, 208.

4. PRACTICE: INSTRUCTION. An instruction, although it asserts a correct principle of law, is improperly given when there is no evidence upon which to base it. *The State v. Chambers*, 406.

5. INSTRUCTIONS. Instructions which are ambiguous and misleading should not be given. *Dunn v. Dunnaker*, 597.

6. ——: MANSLAUGHTER: INSTRUCTION. An instruction for man-

slaughter in the fourth degree, under Revised Statutes, sections 1249 and 1250, which would apply as well to manslaughter in the second degree, under Revised Statutes, section 1242, is incorrect. *The State v. McNally*, 644.

7. ——— : INSTRUCTION. An erroneous instruction is not cured by a subsequent one which properly declares the law. *Ib.*

8. ——— : ———. An instruction which overstates the minimum punishment prescribed by law for an offence is erroneous. *Ib.*

9. ———: REASONABLE DOUBT. An instruction defining a reasonable doubt to be a "real substantial doubt" condemned. *Ib.*

10. CRIMINAL PRACTICE: INSTRUCTION AS TO REASONABLE DOUBT. On the trial of a criminal offence, the instruction as to a reasonable doubt of defendant's guilt should not be based upon any particular defence, or part of the evidence, but should be a general instruction having reference to all the evidence in the case. *The State v. Rockett*, 666.

11. INSTRUCTION. An instruction is properly refused which leaves to the jury to determine a question both of fact and law. *Jordan* v. *The City of Hannibal*, 673.

INSURANCE.

1. INSURANCE: ACTION ON POLICY: DESCRIPTION OF PREMISES. In an action on a policy of insurance, the same particularity in the proof of the description of the premises insured is not required, as in ejectment. Evidence reasonably tending to establish the fact that the house insured was on the plaintiff's land, is sufficient. *Breckinridge* v. *The American Central Insurance Co.*, 62.

2. ——— : ——— : ASSIGNEE. The plaintiff is entitled to recover on the policy, where it appears that he is the legal assignee of the policy, and is the equitable owner of the interest of the insured in the land on which the insured house was situated. *Ib.*

3. EVIDENCE. The defendant, in an action against it on a policy of insurance for the destruction of a house by fire, cannot complain of the rejection of testimony, even conceding it to have been competent, that the house was in bad repute, and had the reputation of being a bawdy house, where such evidence was offered only as affecting the value of the house, and the defendant's own evidence shows that its value was greater than that found by the jury. *Ib.*

4. ANSWER, ADMISSIONS IN. The answer, in this case, held to admit that the building was burned, as charged in the petition, and also that the agents who approved of the assignment of the policy, were defendant's regular agents, and that their signatures, evidencing such consent, were genuine. *Ib.*

5. INSURANCE AGENTS, POWERS OF. The powers of insurance agents are presumed to be co-extensive with the business entrusted to their care, and are not to be narrowed by restrictions or limitations not communicated to the party dealing with him. *Ib.*

6. PRESUMPTIONS. The ordinary presumptions arise as to the orderly course of business between the agents and the company. *Ib.*

7. INSURANCE: INCUMBRANCE: ESTOPPEL. Where the agent who effects the insurance is apprized of the existence of an incumbrance on the property, the company is estopped to complain that such fact is a breach of a warranty contained in the policy. *Ib.*

8. EVIDENCE: PROOF OF LOSS. The objection to the introduction in evidence of the proof of loss, because it was not signed by the plaintiff, is untenable, where it appears that his name was signed to the affidavit, at his instance, and in his presence, by another, and was adopted by plaintiff as his signature, and who was also sworn as to the matters set forth in the affidavit. *Ib.*

9. ——: ——. The proof of loss is only evidence of the fact that it was furnished to the company, and is not evidence of the loss itself. *Ib.*

10. WAIVER. The objection to a proof of loss, or accompanying papers, that they were not signed by the proper person, comes too late at the trial. *Ib.*

11. POLICY: REPAIRS. The fact that plaintiff's grantor, after the sale and conveyance, without plaintiff's knowledge, and without the consent of the company, as required by the policy, caused repairs to be made to the house by mechanics, cannot affect plaintiff's rights under the policy. *Ib.*

INTEREST.

See WILLS, 2.

JUDGMENTS.

1. JUDGMENT: COLLATERAL ATTACK. Where a court has jurisdiction of the parties and the subject-matter, its judgment is not open to collateral attack. *Yates v. Johnson*, 213.

2. ——: PRACTICE. The circuit court may entertain a motion to vacate a judgment in a street opening proceeding, filed more than four years after the judgment, and may sustain the motion at the subsequent term. *The City of St. Louis v. Meyer*, 276.

3. JUDGMENT: EVIDENCE: ATTACHMENT: GARNISHEE. A judgment for or against a garnishee in an action of attachment by one creditor is not binding upon another creditor in an attachment suit by him

against the same garnishee, and the record of the judgment in the former case is not admissible in evidence on the trial of the latter. *Strauss v. Ayres*, 348.

4. JUDGMENT, WHEN A BAR: INJUNCTION. While a cause of action, when prosecuted to a judgment, becomes merged in the judgment, and such judgment is a bar to a second prosecution of the same cause of action, yet it is competent for the parties to agree that such judgment may be set aside and enjoined, upon condition that it shall not affect the right of the plaintiff therein to prosecute a suit on his original cause of action, which formed the basis of the judgment. *Wilson v. The St. Louis, Iron Mountain & Southern Ry. Co.*, 431.

5. THE EVIDENCE in this case held sufficient to show that the original judgment in this cause had been set aside, upon condition that it should not be a bar to a second prosecution by plaintiff upon the same cause of action. *Ib.*

6. PRACTICE: EJECTMENT: JUDGMENT. A judgment in ejectment is no bar to a second action between the same parties for the same property, whether the titles and defences in both cases be the same or not. *Ekey v. Inge*, 493.

7. PARTITION: JUDGMENT: ESTOPPEL. A judgment in partition establishes the title to the land which is the subject of the partition suit, and in an action of ejectment upon an adverse possession or an adverse title, existing at the date of the partition, it is final and conclusive upon all parties to the record. *Holladay v. Langford*, 577.

8. EVIDENCE: JUDGMENT OF SISTER STATE. A judgment, purporting to be rendered in the county of Adams, state of Illinois, before Joseph Sibley, judge of the tenth judicial circuit, and attested by the clerk of the sixth judicial circuit, and the attestation certified to be in due form by Judge Williams, as judge of the sixth judicial circuit, held, properly admissible in evidence. *Taylor v. Heitz*, 660.

9. ——: ——. The difference in the numbering of the judicial circuits, which are subject to legislative changes, is not material in connection with the other facts affirmatively appearing, and it sufficiently appears that Judge Sibley was judge of the circuit court held in Quincy, Adams county, Illinois, where the judgment was rendered. *Ib.*

10. JUDGMENT LIEN, DURATION OF: APPEAL AND SUPERSEDEAS. An appeal from a judgment of the circuit court and a *supersedeas* thereon will not have the effect to extend the judgment lien beyond the time prescribed by the statute. *Christy v. Flanagan*, 670.

11. JUDGMENT: WHEN IN EXCESS OF SUM CLAIMED. A judgment for taxes based on a constructive service and in excess of the sum asked for in the petition, is erroneous on the face of the record. *The State ex rel. Snyder v. Davidson*, 683.

12. ——: ——. A motion made by defendant, at the term at which the sale was had, to set aside such judgment should have been sustained. *Ib.*

JURISDICTION.

1. BACK TAXES, JURISDICTION OF JUSTICES IN SUITS TO ENFORCE STATE'S LIEN FOR. Justices of the peace have no jurisdiction in suits to enforce the state's lien for back taxes. *The State ex rel. Gordon v. Hopkins*, 519.

2. JURISDICTION. Where a court has jurisdiction to determine a question before it prohibition will not lie to restrain its exercise. *The State ex rel. Morse* v. *Burckhartt*, 533.

3. CONSTITUTION: APPEAL TO ST. LOUIS COURT OF APPEALS: AMOUNT IN DISPUTE: JURISDICTION. The relatrix brought suit on a penal bond in the sum of twenty-seven hundred dollars, and judgment was rendered for her for said sum, with execution for twenty-two hundred dollars, the amount of damages recovered by relatrix for the breach of the bond, and the defendant appealed to the St. Louis court of appeals. *Held*, that the amount in dispute on the appeal was twenty-two hundred dollars, the amount of damages recovered for the breach of the bond, and that the St. Louis court of appeals, and not the Supreme Court, therefore, had jurisdiction of the appeal. *The State ex rel. Heye v. The St. Louis Court of Appeals*, 569.

LAND AND LAND TITLE.

1. SUIT TO QUIET TITLE: STATUTE: EVIDENCE. In an action under Revised Statutes, sections 3562 and 3563, to quiet title to land, evidence offered by the plaintiff that he is the owner in fee is properly excluded. It is sufficient for him to show that he is in the actual possession of the property, claiming either an estate of freehold, or an unexpired term of not less than ten years. *Dyer* v. *Baumeister*, 134.

2. ——: ——: POSSESSION. The possession of plaintiff is insufficient to maintain a suit where it is merely nominal and obtained by an act of trespass, for the sole purpose of instituting the proceeding, so as to shift the burden of establishing the title on the defendant. *Ib.*

3. ——. The statutory proceeding to quiet title was not intended as a substitute for the action of ejectment. *Ib.*

4. POSSESSION: TITLE: PRESUMPTION: PATENT. It will be presumed that the United States government was in possession of land and had title thereto at the time of its issuance of a patent to the same. *Long* v. *McDow*, 197.

5. ENTRY UPON LAND: PRESUMPTION. It will be presumed that one's entry upon land was innocent and lawful, and that the heir will

claim title through his ancestor, rather than through a wrongful and unwarranted entry upon the land of a stranger. *Ib.*

6. SWAMP LAND, SALE OF BY SHERIFF: TITLE. A sale of swamp land by the sheriff, under an order of the county court authorizing him to sell such swamp lands as had been certified to the office of the county clerk by the state register of lands, will not be effectual in passing any title to the land where it had not been so certified when the sale was made. *Prior* v. *Scott*, 303.

7. SWAMP LAND, SALE OF BY COMMISSIONER: DEED: TITLE. A deed to swamp land, executed by the swamp land commissioner, in pursuance of a sale made by order of the county court, after the land has been patented by the state to the county, will pass to the grantee the title of the county. *Ib.*

8. EQUITY: LOST DEED. Where title to land is vested in one by a deed which is lost or destroyed before being recorded, a court of equity will protect the rights of the grantee by divesting the grantor of any claim to the land, and by establishing the title in the grantee. *Mason* v. *Black*, 329.

9. MUNIMENTS OF TITLE: NOTICE. The law imputes to a purchaser of land a knowledge of all facts relating to it appearing at the time of his purchase upon the muniments of title, which it was necessary for him to examine in order to ascertain the sufficiency of such title. *Ib.*

10. QUIT-CLAIM DEED: INNOCENT PURCHASER. One is not an innocent purchaser who for a nominal consideration paid by him accepts a quit-claim deed for land, and is informed at the time by the grantor therein, that he does not own the property and makes no claim to it. *Ib.*

11. ——: RECITALS: NOTICE. One who purchases land and takes the same under a chain of title containing a quit-claim of record, in which the grantor therein recites that "it is intended to convey by these presents all title of which I am vested at this day, and not to invalidate any sale heretofore made, if any exists," is put on inquiry by such recital as to the sufficiency of the quit-claim deed to pass the title to the land. *Ib.*

12. ——: ——: ——. Such quit-claim deed, it being of record, constructively notified all persons that the grantor therein was only conveying such title to the land as he had when he made the deed, and that, in his opinion, he had previously conveyed all his title. *Ib.*

13. LIMITATION. The plaintiffs in this case held not to be barred by the plea of the statute of limitations. *Ib.*

14. EQUITY: CLOUD ON TITLE. A suit to remove a cloud on title cannot be maintained when the defect appears on the face of the conveyances through which the opposite party claims title. But

when such claim of title is valid upon the face of the conveyances, and the defect can only be made apparent by extrinsic evidence, particularly if that evidence depends on oral testimony to establish it, a case is made for a court of equity to remove the cloud from the title. *Ib.*

15. ——: ——. The rule that one not in possession cannot maintain a suit in equity to quiet title, or to remove a cloud therefrom, applies where the complainant has the legal title, because he may then bring ejectment for possession. But where the complainant has only the equitable title, and the legal title is in the occupant, it is otherwise. In the latter case, the complainant being unable to sue at law, because he is without the legal title, must assert his rights in a court of equity. *Ib.*

16. EQUITABLE TITLE: STATUTE. In such equitable suit, the court may, under the statute (R. S., sec. 3692), pass the title to plaintiff without any act to be done by defendant, and may also (R. S., sec. 3693), issue a writ of possession to put the former in possession. *Ib.*

17. ON RE-HEARING, the judgment in this case so far modified as to decree the title to be in plaintiffs without annulling certain conveyances executed by persons not parties to this action. *Ib.*

18. FRAUDULENT CONVEYANCE: INNOCENT PURCHASER. A *bona fide* purchaser for a valuable consideration from a fraudulent grantor is not affected by the fraud of the latter. But he must be a *bona fide* purchaser as well as one for a valuable consideration to be so protected. *Craig v. Zimmerman*, 475.

19. ——: ——. A purchaser with notice may protect himself by purchasing the title of a *bona fide* purchaser for a valuable consideration without notice. *Ib.*

20. ——: ——. A purchaser without notice of the fraud may sell and convey a good title to one having notice, and the quit-claim deed of the former, where the property was subject to no equities in his hands, will pass whatever title he had. *Ib.*

21. LAND TITLE: ADVERSE POSSESSION: EJECTMENT. One who incloses and holds land by an open, notorious, adverse possession, against all the world, for a period of ten years will obtain thereby an indefeasible title in fee-simple to the land so inclosed and possessed. *Ekey v. Inge*, 493.

22. LAND TITLE: TOWN PLAT, FAILURE TO ACKNOWLEDGE AND RECORD. The failure to acknowledge or record a plat of an addition to a town held not to affect the title of a purchaser of a lot, it appearing that the survey of the addition had been made and that a plat of the same was filed or deposited, prior to the sale of the lot, in the recorder's office where it remained for many years, although it was lost and could not be produced at the time of the trial. *Rollins v. McIntire*, 496.

23. ESTOPPEL. One claiming title to land under an executory contract is estopped to deny its validity. *Ib.*

24. TOWN PLAT: INNOCENT PURCHASER. The fact that a town plat was not recorded will not defeat the title of one purchasing a lot, in ignorance of such want of record. *Ib.*

25. LAND TITLE: ACT OF FEBRUARY 27, 1874: INSTRUCTION. The claimant, at the date of the act of February 27, 1874 (R. S., 1879, sec. 3225), requiring persons claiming land in possession of another to bring suit therefor within one year from the approval of the act, his predecessors in title within thirty years, and the persons in possession are the only persons within the purview of said act, and an instruction involving said act which requires the jury to find that persons, other than those within its purview, had not paid taxes on the land as stated in the act, is erroneous. *Ib.*

26. ——: ——. Whether or not the claimant and his predecessors in title paid the taxes for thirty years preceding the passage of said act of 1874 is a matter of proof, not of presumption. *Ib.*

27. ——: ——. The non-payment of said taxes need not be directly proved, but may be inferred from facts and circumstances bearing on said question. *Ib.*

28. LAWFUL POSSESSION: STATUTE. The plaintiffs' possession held a lawful one, under the facts of this case, within the meaning of said act of 1874. *Ib.*

LANDLORD AND TENANT.

1. LANDLORD AND TENANT: LIEN: REMOVAL OF CROP BY TENANT: PRACTICE. Under the statute (R. S., sec. 3083) the landlord has a lien upon the whole crop grown on the demised premises, but the tenant is not prohibited from removing any portion of it, but he shall not remove or dispose of it so as to endanger or hinder the landlord's collection of the rent (R. S., sec. 3091); and this is a question for the jury, but is not to be determined with reference to any property the tenant may have elsewhere. *Haseltine v. Ausherman*, 410.

2. ——: DECLARATION OF LANDLORD: EVIDENCE. In an action for rent the landlord is not bound by a promise that he will not claim the rent where no consideration for such promise is alleged or proved, and it is inadmissible in evidence. *Ib.*

LAWS.

See GENERAL LAW.

SPECIAL LAW.

LESSOR AND LESSEE.

1. NUISANCE: LEASED PREMISES. A lessor is not liable for a nuisance created or maintained on the premises by the tenant. *Grogan v. The Broadway Foundry Co.*, 321.

2. CITY OF ST. LOUIS: CHARTER: PARTY. The fact that the city of St. Louis is liable in an action for damages for the nuisance does not make such lessor a necessary party defendant under the charter of the city. (2 R. S., p. 1626, sec. 9). *Id.*

LIENS.

1. DEVISE: EQUITABLE LIEN. Where real estate is devised to one who is by the will required to pay to each of the other devisees named in the will a sum sufficient to make the devises to all equal in value the law in such case will attach an equitable lien on the land for the sums so required to be paid. *Dudgeon v. Dudgeon*, 218.

2. LIEN: SUBROGATION. One loaning money to another, to remove a a lien on land, is not thereby subrogated to the rights of the lienor against the land. *Price* v. *Courtney*, 387.

3. LANDLORD AND TENANT: LIEN: REMOVAL OF CROP BY TENANT: PRACTICE. Under the statute (R. S., sec. 3083), the landlord has a lien upon the whole crop grown on the demised premises, but the tenant is not prohibited from removing any portion of it, but he shall not remove or dispose of it so as to endanger or hinder the landlord's collection of the rent (R. S., sec. 3091); and this is a question for the jury, but is not to be determined with reference to any property the tenant may have elsewhere. *Haseltine* v. *Ausherman*, 410.

4. JUDGMENT LIEN, DURATION OF: APPEAL AND SUPERSEDEAS. An appeal from a judgment of the circuit court, and a *supersedeas* thereon will not have the effect to extend the judgment lien beyond the time prescribed by the statute. *Christy* v. *Flanagan*, 670.

LIMITATIONS.

1. LIMITATIONS: DOWER. The statute of limitations will not begin to run against the heirs so long as the widow has the right to the possession of land. *Roberts v. Nelson*, 229.

2. TAX DEED VOID ON ITS FACE: LIMITATIONS. A tax deed void on its face will not set the special statute of limitations (W. S., sec. 221, p. 1207), in motion. Following *Mason v. Crowder*, 85 Mo. 526. *Pearce v. Tittsworth*, 635.

See LAND AND LAND TITLES, 10.

MACHINERY.

See NEGLIGENCE.

MANDAMUS.

1. MANDAMUS. While mandamus is the appropriate remedy to set the machinery of a court in motion, yet it will not direct the performance of any particular judicial act. *The State ex rel. Lucas v. The St. Louis Court of Appeals*, 374.

2. ———. Mandamus will not lie to compel the St. Louis court of appeals on an appeal to it, from a judgment awarding an execution against a stockholder in a corporation, to proceed to determine the propriety of the judgment, although such court erroneously affirmed the judgment on the ground that the motion was not preserved in the bill of exceptions, although contained in the transcript. *Ib.*

MANSLAUGHTER.

1. PLEADING, CRIMINAL: INDICTMENT: MANSLAUGHTER UNDER REVISED STATUTES, SECTION 1238. An indictment for manslaughter, under Revised Statutes, section 1238, must charge that the killing was done without a design to effect death, and while the doer of the act was engaged in the perpetration or attempt to perpetrate a crime not amounting to a felony, and it is not sufficient that these things may be inferred from the allegations made. Per Sherwood, J. *The State v. Emerich*, 110.

2. ———: ———: MANSLAUGHTER: REVISED STATUTES, SECTION 1241. An indictment for manslaughter under Revised Statutes, section 1241, which does not contain the words, "pregnant with a quick child," is fatally defective. Per Sherwood, J. *Ib.*

3. ———: ———: RETROSPECTIVE STATUTE: REVISED STATUTES, SECTION 1268. Revised Statutes, section 1268, having been amended in 1879 by the addition of the words, "but if the death of such woman ensue from the means so employed, the person so offending shall be deemed guilty of manslaughter in the second degree," does not apply to an abortion defined therein from which death results, where the same was perpetrated prior to the taking effect of the Revised Statutes of 1879. *Ib.*

4. CRIMINAL LAW: INSTRUCTION: MANSLAUGHTER. The definitions of manslaughter in the fourth degree, as given in Revised Statutes, sections 1249 and 1250, should not be blended in the same instruction, but that offence, as defined in said sections should be contained in separate instructions. *The State v. Chambers*, 406.

5. THE EVIDENCE in this case held to entitle the accused to an instruction for manslaughter in the fourth degree. *Ib.*

6. ———: MANSLAUGHTER: INSTRUCTION. An instruction for man

slaughter in the fourth degree, under Revised Statutes, sections 1249 and 1250, which would apply as well to manslaughter in the second degree, under Revised Statutes, section 1242, is incorrect. *The State v. McNally*, 644.

MARRIED WOMEN.

1. MARRIED WOMAN. RIGHT OF TO CONTRACT AS TO SEPARATE PROPERTY. A married woman has the power to contract with respect to her separate property, and she may own property with her husband, and with others. *Dunifer v. Jecko*, 282.

1. HUSBAND AND WIFE: PARTIES: ESTOPPEL: WITNESS, Where a wife assists her husband in the conduct of a newspaper, and they, as partners, have mutual dealings with a third party, she is *prima facie*, at least, entitled to be joined with the husband in a suit against such party for a debt due the paper, and where, in such suit defendant receives the benefit of an off-set as against both husband and wife, he will be estopped to complain as to misjoinder of parties; and the wife, having a substantial interest in the controversy, is competent to testify in the cause. *Ib.*

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. MASTER AND SERVANT: DEFECTIVE MACHINERY: NEGLIGENCE. Knowledge of the danger arising from defective machinery, as well as the existence of the defect, is necessary to bar a recovery by an employe suing a master for injuries resulting from the latter's negligence in furnishing him with such machinery. This rule, however, does not apply where the defect is so glaring and obvious, that a simple knowledge of the defects would imply a knowledge of the dangers arising therefrom. *Waldhier* v. *The Hannibal & St. Joseph Railway Co.*, 37.

1. ——— : ——— : ———. Plaintiff was a switchman in the service of the defendant, a railway company, and was injured while attempting to make a coupling of cars, by reason of his foot being caught in a defective frog in the track. The frog was a solid casting with a steel point set in, and it had a steel plate on top, fastened with three rivets. At the time of the accident the steel point was loose and the plate was broken at the middle rivet, so that it had worked around, outside and over the rail. The train was moving slowly, and the plaintiff, while walking along it, and attempting to make the coupling, struck his foot against the broken plate, causing him to stumble and his foot to slip in at the broken point of the frog, and was held in this position until run over by the car. Plaintiff testified that he knew the point of the frog was and had been broken loose, and out of repair, for a week before the accident, but that he did not know the plate was broken until his foot struck it, and that he then, for the first time, saw its condition. *Held*, that the court did not err in instructing the jury that, although the plaintiff may have known that the point of the frog was broken, yet such knowledge would not bar recovery on his

part if he did not know that the plate was broken, and would not have been injured but for the broken plate, provided, a person of ordinary care and prudence would have worked about the frog with a broken point. *Ib.*

3. PROXIMATE CAUSE. The fact of the plate being out of repair, having caused the plaintiff to stumble, the defective plate must be regarded as the proximate cause of the injury. *Ib.*

4. DEFECTIVE MACHINERY: INSPECTION, WHEN NOT DUTY OF SERVANT. While a servant must take notice of the defects which he discovers, and of which he has information, and of such as are obvious to the senses, yet the defect in the frog, being in a department of the work with which plaintiff had nothing to do, by way of inspection or repair, it was not his duty to enter upon an inquiry as to the condition of the whole frog, although he may have known its point was loose. *Ib.*

5. MASTER AND SERVANT: BURDEN OF PROOF. The law presumes that the master exercises care in the employment of his servants, and the burden is upon him who alleges negligence in this particular to prove it. *McDermott* v. *The Hannibal & St. Joseph Railroad Company*, 285.

6. ——: VICE-PRINCIPAL: NEGLIGENCE. In an action by a servant for damages occasioned by the incompetency and carelessness of a vice-principal, the master is liable whether he knew of such incompetency and carelessness or not, provided they were unknown to the person so injured. *Ib.*

7. FELLOW SERVANTS. A section foreman who is intrusted by the railroad company with power to superintend, direct and control the workmen under his charge is not a fellow servant of such workmen. Affirming *Moore* v. *The Wabash, St. Louis & Pacific Railway Co.*, 85 Mo. 588. *Ib.*

8. MASTER AND SERVANT: VICE-PRINCIPAL, KNOWLEDGE OF. The master is chargeable with his vice-principal's knowledge of the incompetence and carelessness of a servant under his superintendence and control. *Ib.*

9. ——: ORDERS OF MASTER: CONTRIBUTORY NEGLIGENCE. A servant is not bound, under all circumstances and at all hazards, to obey the orders of his master. He cannot recover damages of the master for injuries received while obeying the latter's order, if he had time to deliberate and vo untarily, and with knowledge of the peril placed himself in a position in which he was more than likely to be injured. *Ib.*

10. NEGLIGENCE. Whether one act of negligence is sufficient to establish incompetency in a servant depends upon the character of the act. *Ib.*

11. NEGLIGENCE OF FELLOW SERVANT. A servant cannot recover for

an injury occasioned by the incompetency, recklessness and carelessness of a fellow servant, where he had knowledge of the same before the injury and notwithstanding such knowledge and without objection, continued in the master's service. *Ib.*

12. MASTER AND SERVANT: NEGLIGENCE OF VICE-PRINCIPAL: KNOWLEDGE OF SERVANT. A servant who takes employment to work under one who stands in the relation of vice-principal to the master, knowing that such vice-principal is incompetent and negligent in regard to his duty respecting the particular work the servant has undertaken to do, and continues in the service without objection, cannot recover of the master for injuries sustained in consequence of the incompetency and negligence of such vice-principal. *Ib.*

13. MASTER AND SERVANT: MASTER NOT LIABLE FOR CRIMINAL ACT OF SERVANT: TRESPASS: RAILROADS: CONDUCTOR. The master is not liable for the criminal acts of his servant, not authorized or sanctioned by him, nor for his acts of wilful and malicious trespass. If a conductor knowingly and wilfully participates in the act of taking and transporting upon the cars, against his will, one whom he had no right to receive, he, and not the company, will be liable for his acts. *Jackson v. The St. Louis, Iron Mountain & Southern Ry. Co.*, 422.

14. EVIDENCE: DECLARATIONS OF AGENTS. Declarations of a servant are not competent evidence against a master, unless made while the former is transacting the business of the latter; they must be co-incident with the events to which they relate, and not narratives of what has passed. *Devlin v. The Wabash, St. Louis & Pacific Ry. Co.*, 545.

15. MASTER AND SERVANT: APPLIANCES FURNISHED SERVANT: DEFECTS IN: DUTY OF SERVANT. A servant in the use of appliances furnished him by the master is bound to take notice of those dangerous defects, of which he has knowledge, and which are obvious to his senses, but he is not bound to investigate for himself a department of work with which he has nothing to do, and to set up his judgment against that of his master as to the safety of such appliances. *Ib.*

16. ——: NEGLIGENCE: PLEADING. In an action by a servant against the master for negligence in furnishing improper appliances for the servant's use in his work, whereby he was injured, the petition need not aver either that plaintiff did not know, or could not have known, by the exercise of ordinary care, the dangerous and defective construction of the appliance. *Crane v. The Missouri Pacific Ry. Co.*, 588.

17. ——: ——: ——. But in such action the petition must charge that the master either knew, or might have known, of the dangerous and defective construction of the appliance, or it must contain an equivalent averment. *Ib.*

18. ——: ——: ——. An allegation that the defendant negli-

gently furnished an appliance which was defective and unsafe, is an equivalent averment, and is sufficient. *Ib.*

MISJOINDER.

OF PARTIES. *Albers v. Bedell*, 183.

MISTAKE.

See EQUITY, 7.

MORTGAGES AND DEEDS OF TRUST.

1. MORTGAGE OF MERCHANDISE, WHEN VOID AS A MATTER OF LAW. Where it appears upon the face of a mortgage conveying goods and merchandise that the mortgageor is to remain in possession of the property, and to sell it in the usual course of business for his own benefit, such mortgage is void as a matter of law under Revised Statutes, section 2496, for the reason that the conveyance is for the use of the grantor, and it is then the duty of the court to pass on the legal effect of the mortgage and to declare it void. *Bullene v. Barrett*, 185.

2. ——: IMPEACHMENT OF BY INTRINSIC EVIDENCE. Where such facts as would render the deed void on its face appear by extrinsic evidence, the same legal effect follows. It is not necessary in such case that it be made further to appear that the intent of the parties to the conveyance was in fact to hinder and delay creditors. *Ib.*

3. ——: ——: INSTRUCTIONS. Where a mortgage valid on its face is sought to be impeached by extrinsic evidence, it is the duty of the court to submit to the jury for its determination the question whether the impeaching facts are true, and to direct that if they are established to their satisfaction they will find the conveyance to be void as to creditors. *Ib.*

4. ——: FIXTURES. A mortgage of a stock of goods and store fixtures, although void as to former creditors because the grantor was permitted to remain in possession and dispose of the merchandise for his own use, will not, for that reason, be invalid as to the fixtures. *Ib.*

5. DEED OF TRUST, LIABILITY OF PURCHASER UNDER. Where property is purchased subject to a deed of trust, it will be chargeable in the purchaser's hands with the debt secured by the trust deed, over and above his bid at the sale. *Scheppelmann v. Feurth*, 351.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATION: STREETS: UNSAFE WALL. It is the duty of a city to keep its streets in a reasonably safe condition for persons traveling thereon, and this obligation extends to an unsafe wall,

standing by the side of the street, after notice of such fact, *Kiley v. The City of Kansas*, 103.

2. ——: ——: ——. Where the person so injured by the falling wall was not using the street for any purpose, there can be no recovery from the city for the injury. *Ib.*

3. ——: NUISANCE. A city is not liable for injuries resulting to a person from its failure to abate a nuisance existing on private property, and not created by its agents, although it had the power to do so. *Ib.*

4. MUNICIPAL CORPORATION: STREET: CONSTITUTION. A city ordinance, passed in pursuance of a charter requiring the city to keep its streets in repair, is not unconstitutional because it directs the city engineer to make the repairs at the expense of the adjacent property owner without notice to the latter. *The City of Kansas v. Huling*, 203.

5. ——: ——. When sued on the special tax bill the property owner can have his day in court and make his defence. *Ib.*

6. NEGLIGENCE: CITY: FALLING WALLS. A city is liable for injuries resulting from the walls of a house destroyed by fire having fallen, when their dangerous condition, by the exercise of ordinary care on its part, could have been discovered in time to have secured or taken them down. *Grogan v. The Broadway Foundry Co.*, 321.

7. CITY OF ST. LOUIS: CHARTER: PARTY. The fact that the city of St. Louis is liable in an action for damages for a nuisance does not make a lessor a necessary party defendant under the charter of the city. (2 R. S., p. 1626, sec. 9). *Ib.*

8. MUNICIPALITY: DANGEROUS BUILDING: ORDINANCE. Whenever it is discovered by the officers of a city that a structure exists on the side of its street in so unsafe a condition as to endanger the safety of persons using the street, it becomes the duty of the city either to remove or secure it, and the city cannot relive itself of this duty by an ordinance providing that the mayor shall require the owner of the building to have the same secured or removed within a time fixed in the ordinance, and, on his failure to do so, that the city shall perform the duty. *Ib.*

9. ——: GENERAL LAW. The act of the legislature of March 11, 1885 (Acts 1885, p. 63), authorizing any city containing more than twenty thousand, and less than two hundred and fifty thousand inhabitants, existing by virtue of special or local laws, to extend its limits, etc., is a general law, and is therefore not within the inhibitions of the constitution against the enactment of special or local laws for the regulation of cities and towns. *Kelly* v. *Meeks*, 396.

10. ——: LAW AUTHORIZING CITIES TO EXTEND THEIR LIMITS. While such acts conferring on cities the power to extend their limits are

constitutional and valid, yet the power so conferred must be reasonably and properly exercised. *Ib.*

11. MUNICIPAL CORPORATION: DEFECTIVE BRIDGE. Where a city undertakes to build a bridge for public travel, it is bound to put and keep the same in a reasonably safe condition for such use. *Jordan* v. *The City of Hannibal*, 673.

12. ——: ——. The rule that a municipal corporation acts judicially in selecting a plan upon which a public improvement is to be constructed, and that no private action will lie for lack of judgment in that respect, has no application to an injury resulting from its negligent construction of a bridge. *Ib.*

13. ——: PERMITTING BRIDGE TO BE OUT OF REPAIR: NOTICE. In an action against a city for an injury resulting from having permitted its bridge to get out of repair, it must be shown to have had notice of the defective condition of the bridge, or that the same existed for such a length of time that the city, by the use of ordinary care, would have discovered the defect in time to have repaired it. *Ib.*

14. CITY: STREETS. The streets of a city are held by it in trust for the public exclusively for street purposes. *Glasgow v. The City of St. Louis*, 678.

15. ——: ——: ST. LOUIS CITY: CHARTER. The charter of the city of St. Louis held not to confer on the council the power to enact an ordinance, declaring that a part of one of its streets should be vacated for twenty years, that the adjoining owners should have its use for that time, and providing that at the end of the twenty years the street should revert to the city for a public thoroughfare. *Ib.*

MUNIMENTS OF TITLE.

See DEEDS, 7.

NEGLIGENCE.

1. MASTER AND SERVANT: DEFECTIVE MACHINERY: NEGLIGENCE. Knowledge of the danger arising from defective machinery, as well as the existence of the defect, is necessary to bar a recovery by an employe suing a master for injuries resulting from the latter's negligence in furnishing him with such machinery. This rule, however, does not apply where the defect is so glaring and obvious that a simple knowledge of the defects would imply a knowledge of the dangers arising therefrom. *Waldhier* v. *The Hannibal & St. Joseph Railway Co.*, 37.

2. ——: ——: ——. Plaintiff was a switchman in the service of the defendant, a railway company, and was injured while attempting to make a coupling of cars, by reason of his foot being caught in a defective frog in the track. The frog was a solid cast-

ing with a steel point set in, and it had a steel plate on top, fastened with three rivets. At the time of the accident the steel point was loose and the plate was broken at the middle rivet, so that it had worked around, outside and over the rail. The train was moving slowly, and the plaintiff, while walking along it, and attempting to make the coupling, struck his foot against the broken plate, causing him to stumble and his foot to slip in at the broken point of the frog, and was held in this position until run over by the car. Plaintiff testified that he knew the point of the frog was and had been broken loose, and out of repair, for a week before the accident, but that he did not know the plate was broken until his foot struck it, and that he then, for the first time, saw its condition. *Held*, that the court did not err in instructing the jury that, although the plaintiff may have known that the point of the frog was broken, yet such knowledge would not bar recovery on his part if he did not know that the plate was broken, and would not have been injured but for the broken plate, provided, a person of ordinary care and prudence would have worked about the frog with a broken point. *Ib.*

3. PROXIMATE CAUSE. The fact of the plate being out of repair, having caused the plaintiff to stumble, the defective plate must be regarded as the proximate cause of the injury. *Ib.*

4. DEFECTIVE MACHINERY: INSPECTION, WHEN NOT THE DUTY OF SERVANT. While a servant must take notice of defects which he discovers, and of which he has information, and of such as are obvious to the senses, yet the defect in the frog, being in a department of the work with which plaintiff had nothing to do, by way of inspection or repair, it was not his duty to enter upon an inquiry as to the condition of the whole frog, although he may have known its point was loose. *Ib.*

5. MUNICIPAL CORPORATION: STREETS: UNSAFE WALL. It is the duty of a city to keep its streets in a reasonably safe condition for persons traveling thereon, and this obligation extends to an unsafe wall, standing by the side of the street, after notice of such fact. *Kiley* v. *City of Kansas*, 103.

6. ——: ——: ——. Where the person so injured by the failing wall was not using the street for any purpose, there can be no recovery from the city for the injury. *Ib.*

7. ——: NUISANCE. A city is not liable for injuries resulting to a person from its failure to abate a nuisance existing on private property, and not created by its agents, although it had the power to do so. *Ib.*

8. RAILROADS: NEGLIGENCE: ESCAPE OF FIRE: EVIDENCE. In an action against a railroad company for negligently suffering its right of way to become covered with dry grass, etc., and negligently permitting fire to escape from one of its passing locomotives, which fire was communicated to plaintiff's premises, and his property thereby destroyed, after plaintiff has offered evidence tending to support the allegations of the petition, it is permissible for the de-

fendant to offer testimony going to show that the engineer and fireman were competent and careful, and that the locomotive was of a new and approved make, was supplied with a good spark arrester, and had been properly inspected. *Patton* v. *The St. Louis & San Francisco Ry. Co.*, 117.

9. ——— : ——— : ——— : ———. Where there is no dispute as to the identity of the locomotive from which fire escaped and communicated to plaintiff's premises, it is competent to show that the same locomotive, on the same trip, and about the same time and place, set out other fires in its passage as raising an inference of some weight that there was something unsuitable in its construction or management. *Ib.*

10. ——— : DAMAGES BY FIRE : CONTRIBUTORY NEGLIGENCE. It is no defence to an action for damages against a railroad company for negligently permitting fire to escape from its locomotive and destroy plaintiff's crops, that the natural growth of grass and stubble was allowed to remain on plaintiff's field, and especially is this so when there is no evidence going to show that this is out of the usual course of husbandry. *Ib.*

11. ——— : VICE-PRINCIPAL : NEGLIGENCE. In an action by a servant for damages occasioned by the incompetency and carelessness of a vice-principal, the master is liable whether he knew of such incompetency and carelessness or not, provided they were unknown to the person so injured. *McDermott v. The Hannibal & St. J. Ry. Co.*, 285.

12. ——— : ORDERS OF MASTER : CONTRIBUTORY NEGLIGENCE. A servant is not bound, under all circumstances and at all hazards, to obey the orders of his master. He cannot recover damages of the master for injuries received while obeying the latter's order, if he had time to deliberate, and voluntarily, and with knowledge of the peril, placed himself in a position in which he was more than likely to be injured. *Ib.*

13. NEGLIGENCE. Whether one act of negligence is sufficient to establish incompetency in a servant depends upon the character of the act. *Ib.*

14. PRACTICE : INSTRUCTIONS. Where the petition alleges and the evidence shows several acts of negligence as grounds of recovery plaintiff's right to recover should not be confined by instruction to one ground alone. *Ib.*

15. NEGLIGENCE OF FELLOW SERVANT. A servant cannot recover for an injury occasioned by the incompetency, recklessness and carelessness of a fellow servant, where he had knowledge of the same before the injury, and notwithstanding such knowledge and without objection continued in the master's service. *Ib.*

16. MASTER AND SERVANT : NEGLIGENCE OF VICE-PRINCIPAL : KNOWLEDGE OF SERVANT. A servant who takes employment to work

under one who stands in the relation of vice-principal to the master, knowing that such vice-principal is incompetent and negligent in regard to his duty respecting the particular work the servant has undertaken to do, and continues in the service without objection, cannot recover of the master for injuries sustained in consequence of the incompetency and negligence of such vice-principal. *Ib.*

17. NEGLIGENCE: CONCURRENT ACCIDENT. Where an unforeseen event, concurrent in point of time with an act of negligence, co-operates with the latter to produce an injury, it will not excuse the negligence. *Ib.*

18. PLEADING: PETITION. An action for the negligence of a fellow servant should not be blended in the same count with one for the negligence of a vice-principal. *Ib.*

19. DEATH OF PERSON FROM NEGLIGENCE: ASSESSMENT OF DAMAGES. On the trial of an action for the death of plaintiff's son, by reason of defendant's negligence, the jury can find the amount of the damages from the proof of the age of deceased and the circumstances and condition in life of plaintiff. *Grogan v. The Broadway Foundry Company*, 321.

20. NEGLIGENCE. CITY: FALLING WALLS. A city is liable for injuries resulting from the walls of a house destroyed by fire having fallen when their dangerous condition, by the exercise of ordinary care on its part, could have been discovered in time to have secured or taken them down. *Ib.*

21. RAILROAD: NEGLIGENCE: DUTY OF CONDUCTOR TO TRANSPORT PRISONER. Where one assuming to act as an officer, represents himself as such to the conductor of a railroad train, and offers to put upon the train as a passenger a person whom he claims to have arrested for crime, the conductor is not required to inquire into the cause of the arrest and the authority of the officer, but is justified in taking such prisoner in good faith upon the train and is guilty of no wrongful act in so receiving and transporting him. *Jackson v. The St. Louis, Iron Mountain & Southern Ry. Co.*, 422.

22. ——: DEFECTIVE TRACK: ENGINEER. An engineer of a railroad, which is in general use, although having knowledge that the rails of the track were old, light and well worn, is not bound to pursue the inquiry and to determine for himself, and at his own peril, whether the road is or is not fit for use. *Devlin* v. *The Wabash, St. Louis & Pacific Ry. Co.*, 545.

23. ——: ——: ——. The engineer was not bound to quit the service, nor did he assume all risks from want of repair, unless the track was so far out of repair, to his knowledge, that it would be necessarily dangerous to the mind of a prudent person to run an engine over it. *Ib.*

24. ——: ——. A railroad is not bound to furnish in such case a

safe track, its duty in that respect being to use all reasonable care and precaution in placing and keeping it in good order and condition. *Ib.*

25. MASTER AND SERVANT: NEGLIGENCE: PLEADING. In an action by a servant against the master for negligence in furnishing improper appliances for the servant's use in his work, whereby he was injured, the petition need not aver either that plaintiff did not know, or could not have known, by the exercise of ordinary care, the dangerous and defective construction of the appliance. *Crane v. The Missouri Pacific Railway Co.*, 588.

26. ——: ——: ——. But in such action the petition must charge that the master either knew, or might have known, of the dangerous and defective construction of the appliance, or it must contain an equivalent averment. *Ib.*

27. ——: ——: ——. An allegation that the defendant negligently furnished an appliance which was defective and unsafe, is an equivalent averment, and is sufficient. *Ib.*

28. MUNICIPAL CORPORATION: DEFECTIVE BRIDGE. Where a city undertakes to build a bridge for public travel, it is bound to put and keep the same in a reasonably safe condition for such use. *Jordan* v. *The City of Hannibal*, 673.

29. ——: ——. The rule that a municipal corporation acts judicially in selecting a plan upon which a public improvement is to be constructed, and that no private action will lie for lack of judgment in that respect, has no application to an injury resulting from its negligent construction of a bridge. *Ib.*

30. ——: PERMITTING BRIDGE TO BE OUT OF REPAIR: NOTICE. In an action against a city for an injury resulting from having permitted its bridge to get out of repair, it must be shown to have had notice of the defective condition of the bridge, or that the same existed for such a length of time that the city, by the use of ordinary care, would have discovered the defect in time to have repaired it. *Ib.*

31. BRIDGE, DRIVING ON IN TROT. Driving a horse in a trot upon a bridge held, in this case, not to be contributory negligence. *Ib.*

NEGLIGENCE: FURNISHING SERVANT WITH DANGEROUS APPLIANCE. *Crane* v. *The Missouri Pacific Railway Co.*, 588.

NEW TRIAL.

1. ——: NEW TRIAL: AFFIDAVIT. The affidavit of an applicant for new trial must allege that the verdict is unjust and that the applicant has merits. *Culbertson* v. *Hill*, 553.

2. ——: ——: ——. The information as to the evidence upon which a new trial is asked must come directly from the affidavit of

the witnesses to whom the applicant for a new trial refers, or good cause must be shown for failure to so furnish it. *Ib.*

8. ——: ——. Newly discovered evidence which is merely cumulative, or which is not sufficiently material to probably change the result if a new trial were granted, will not warrant the granting of the same. *Ib.*

4. ——: NEW TRIAL: NEWLY DISCOVERED EVIDENCE. Newly discovered evidence which is cumulative in its character affords no ground for a new trial. *The State* v. *Griffin*, 608.

5. CRIMINAL PRACTICE: PREJUDICE OF JUROR: NEW TRIAL. It is a good ground for a new trial when a juror, on his *voir dire* examination, has stated that he has neither formed nor expressed an opinion as to the guilt or innocence of the accused, it comes to the knowledge of the latter, after verdict, that such juror had prejudged the case, and that fact is made to appear to the satisfaction of the court. *The State* v. *Gonce*, 627.

6. ——: NEW TRIAL: NEWLY DISCOVERED EVIDENCE. Testimony, merely cumulative or the effect of which is only to discredit or impeach a former witness, is unavailing in a motion for a new trial on the ground of newly discovered evidence. *The State* v. *Rockett*, 666.

NOTICE.

1. NOTICE. A *lis pendens* notice filed under Revised Statutes, section 3217, is notice only of the result of the suit. *Gordon* v. *Ritenour*, 54.

2. MUNIMENTS OF TITLE: NOTICE. The law imputes to a purchaser of land a knowledge of all facts relating to it appearing at the time of his purchase upon the muniments of title, which it was necessary for him to examine in order to ascertain the sufficiency of such title. *Mason* v. *Black*, 329.

3. ——: RECITALS: NOTICE. One who purchases land and takes the same under a chain of title containing a quit-claim deed of record, in which the grantor therein recites that "it is intended to convey by these presents all title of which I am vested at this day, and not to invalidate any sale heretofore made, if any exists," is put on inquiry by such recital as to the sufficiency of the quit-claim deed to pass the title to the land. *Ib.*

4. ——: ——: ——. Such quit-claim deed, it being of record, constructively notified all persons that the grantor therein was only conveying such title to the land as he had when he made the deed, and that, in his opinion, he had previously conveyed all his title. *Ib.*

NOTORIETY.

See EVIDENCE, 56.

NUISANCE.

1. ——: NUISANCE. A city is not liable for injuries resulting to a person from its failure to abate a nuisance existing on private property, and not created by its agents, although it had the power to do so. *Kiley* v. *The City of Kansas*, 103.

2. NUISANCE: LEASED PREMISES. A lessor is not liable for a nuisance created or maintained on the premises by the tenant. *Grogan* v. *The Broadway Foundry Company*, 331.

3. CITY OF ST. LOUIS: CHARTER: PARTY. The fact that the city of St. Louis is liable in an action for damages for the nuisance does not make such a lessor a necessary party defendant under the charter of the city. (R. S., p. 1626, sec. 9). *Ib.*

4. NUISANCE. One is liable for injuries resulting from a nuisance continued after he came into the possession of the premises, though such nuisance was not created by him. *Ib.*

OFFICES AND OFFICERS.

1. CONSTITUTIONAL LAW: INCREASE OF SALARY DURING TERM: TERM OF OFFICE. The salary of the assessor and collector of water rates of the city of St. Louis, whose term of office is for "four years and until his successor shall have been duly appointed and qualified," cannot be increased during the term for which he was appointed. And the time he holds over the designated period of four years is as much a part of the term of his office as that which precedes the date at which the new appointment should be made, and no increase of salary made during his term can be allowed him for such time so held over. Const. 1875, art. 14, sec. 8; Scheme and Charter, R. S., p. 1587, par. 8, p. 1627, sec. 17. *The State ex rel. Stevenson* v. *Smith*, 158.

2. PROCESS: SHERIFF, DUTY OF IN SERVICE OF SUMMONS. A sheriff is required to make a reasonable effort, in good faith, to serve a writ of summons, and must act honestly and diligently, having due regard to his duties to all litigants and to the public. The extent of inquiry to be made by him depends upon the circumstances of each case. *The State ex rel. Kearney* v. *Finn*, 310.

3. ——: ——. The return of *non est* to a writ of summons by an officer includes the assertion that he has made honest and diligent effort to find the defendants, as the law requires. *Ib.*

4. ——: LIABILITY OF OFFICER FOR FALSE RETURN: DAMAGES. The fact that an order of publication intervened, in the regular course

of practice in court, between a false return of *non est* to a summons by an officer and judgment by default, will not have the effect of shielding the officer from liability for the false return, and the loss suffered by the defendant, in consequence of an execution sale of his property under the judgment by default, is a proper element of damages in an action by him against the sheriff for a false return. *Ib.*

4. ——: OFFICER: ARREST. A peace officer has a right to arrest without warrant for a misdemeanor where the arrest is made *flagrante delicto*, and he is possessed of the same powers in making such arrest, and is authorized to employ the same force, and to resort, where necessary, to the same extreme measures in overcoming resistance, as in case of a felony. Per Sherwood and Black, JJ. *The State* v. *McNally*, 644.

4. ——: ——: ——. If an officer, in making an arrest for a misdemeanor, is resisted, he may apply force to accomplish the arrest, and if it become necessary to kill the offender to save his own life or person from great bodily harm, he may do so. Per Henry, C. J., and Norton and Ray, JJ. *Ib.*

PARTIES.

1. DEED OF TRUST: PARTITION: PARTIES. *Semble* that a trustee and *cestui que trust* in a deed of trust given on land to secure the payment of a debt, are proper parties in a suit for the partition of the premises. *Yates v. Johnson*, 213.

1. HUSBAND AND WIFE: PARTIES: ESTOPPEL: WITNESS. Where a wife assists her husband in the conduct of a newspaper, and they, as partners, have mutual dealings with a third party, she is, *prima facie*, at least, entitled to be joined with the husband in a suit against such party for a debt due the paper, and where, in such suit, defendant receives the benefit of an off-set as against both husband and wife, he will be estopped to complain as to misjoinder of parties; and the wife, having a substantial interest in the controversy, is competent to testify in the cause. *Dunifer* v. *Jecko*, 282.

PARTITION.

1. DEED OF TRUST: PARTITION: PARTIES. *Semble* that a trustee and *cestui que trust* in a deed of trust given on land to secure the payment of a debt are proper parties in a suit for the partition of the premises. *Yates* v. *Johnson*, 213.

1. PARTITION: COSTS. The proceeds of the sale of one tract of land, sold for the purposes of partition, cannot be applied in payment of fees or costs accrued in proceedings for partition of another tract of land. *The Liberty Savings Association* v. *The Commercial Savings Bank*, 225.

1. PARTITION: JUDGMENT: ESTOPPEL. A judgment in partition establishes the title to the land which is the subject of the partition suit

and in an action of ejectment upon an adverse possession or an adverse title, existing at the date of the partition, it is final and conclusive upon all parties to the record. *Holladay* v. *Langford*, 577,

4. ——: ——: ——. A party to a partition suit cannot recover the partition premises upon a title acquired by him during the pendency of the partition proceeding and prior to the final decree therein. *Ib.*

PERJURY.

1. PLEADING, CRIMINAL: PERJURY: INDICTMENT. An indictment for perjury which names and particularizes the cause in which the alleged perjury was committed, and the court in which the cause was tried, avers the materiality of the issue so that the court can determine it: avers that the oath was administered by one having competent authority, sets out the facts alleged to have been sworn to, negatives their truth, and properly assigns perjury upon them, is sufficient under Revised Statutes, section 1424. *The State* v. *Huckeby*, 414.

2. THE INDICTMENT for perjury in this case examined and held sufficient. *Ib.*

PERSONAL PROPERTY.

1. PERSONAL PROPERTY: SALE: WEIGHING, ETC. Where personal property is actually sold and delivered, the matter of measuring, weighing, or counting, will not be regarded as part of the contract of sale, but will be considered as referred to adjustment on the final settlement of the account. *McMillan* v. *Schweitzer*, 402.

2. EVIDENCE. It is better for the witnesses, where the possession of personal property is controverted, to state the facts bearing on such question, but where they state simply that one party was in possession, and no effort is made by the other party, by cross-examination, or otherwise, to have the particular facts relating to such possession detailed, the judgment will not be reversed because of the admission of the evidence in the objectionable form. *Ib.*

PLAT.

See LAND AND LAND TITLES, 22, 24.

PLEADING.

1. ——: PLEADING: PRACTICE. A petition in a cause which does not ask for judgment against defendant as a stockholder, but only for an order for execution against him on the basis of a judgment already obtained against his corporation in another court, can only be treated as a motion for an order for an execution under Revised Statutes, section 736, and must fail because not filed

in the court where the judgment was obtained. *Paxon* v. *Talmage*, 13.

2. PLEADING: PRACTICE: DEMURRER. A motion to strike out portions of the answer is properly treated as a demurrer, and as such relating back to the petition and questioning its sufficiency, for any substantial error or defect which would render a verdict nugatory if founded upon it. *Ib.*

3. SLANDER: PLEADING: ANSWER. To state a complete defence to the speaking of slanderous words, which of themselves amount to a charge of larceny, it must appear upon the face of the answer that they were accompanied by a statement of facts showing that no larceny was committed. *Trimble* v. *Foster*, 49.

4. ——: PLEADING: PRACTICE. Under the statute (Revised Statutes, section 3553), mitigating circumstances may be pleaded in an action for slander, and are admissible in evidence to reduce the amount of damages, but not to defeat the action. *Id.*

5. ANSWER, ADMISSIONS IN. The answer, in this case, held to admit that the building was burned, as charged in the petition, and also that the agents who approved of the assignment of the policy, were defendant's regular agents, and that their signatures, evidencing such consent, were genuine. *Breckinridge* v. *The American Central Insurance Co.*, 62.

6. PLEADING: PETITION. Where plaintiff sues for damages for the destruction by fire of wheat and oats unthreshed and in the stack, and corn upon the stalk, the petition covers not only the grain, but the straw and stalks. *Patton* v. *The St. Louis & San Francisco Railway Co.*, 117.

7. THE PETITION IN THIS CASE, held, not to be in the nature of a proceeding to charge the separate property of a married woman with a debt contracted by her, but rather to be one to charge the property of the husband with his own debt. *Albers* v. *Bedell*, 183.

8. RAILROADS: KILLING STOCK: DOUBLE DAMAGES: STATEMENT. A statement against a railroad company, under Revised Statutes, section 809, for double damages for killing a cow, which does not allege that she got upon the track at a point where the company was by law required to erect and maintain fences, is insufficient. *Manz* v. *The St. Louis, Iron Mountain & Southern Railway Company*, 278.

9. ——: ——: ——: ——. The statement is defective where it does not allege that the animal got on the track where the same "passes through, along or adjoining enclosed or cultivated fields or unenclosed lands," or that the killing took place at any such point. *Ib.*

10. PLEADING: PETITION. An action for the negligence of a fellow servant should not be blended in the same count with one for the

negligence of a vice-principal. *McDermott* v. *The Hannibal & St. Joseph Railway Co.*, 285.

11. PLEADING, AMENDMENT OF. The refusal of the trial court in this case, to permit plaintiff, before final judgment, to amend his petition in order to conform it to the proofs, held to be error. *Carr* v. *Moss*, 447.

12. ——: ——. The code in relation to amendment of pleadings is liberal, and the courts in relation to the same should at least be as liberal as the statute. *Ib.*

13. PLEADING. A plaintiff need only allege in his petition what he is bound to prove to make out his *prima facie* case. *Crane* v. *The Missouri Pacific Railway Co.*, 588.

14. MASTER AND SERVANT: NEGLIGENCE: PLEADING. In an action by a servant against the master for negligence in furnishing improper appliances for the servant's use in his work, whereby he was injured, the petition need not aver either that plaintiff did not know, or could not have known, by the exercise or ordinary care, the dangerous and defective construction of the appliance. *Ib.*

15. ——: ——: ——. But in such action the petition must charge that the master either knew, or might have known, of the dangerous and defective construction of the appliance, or it must contain an equivalent averment. *Ib.*

16. ——: ——: ——. An allegation that the defendant negligently furnished an appliance which was defective and unsafe, is an equivalent averment, and is sufficient. *Ib.*

PLEADING, CRIMINAL.

1. PLEADING, CRIMINAL: INDICTMENT: MANSLAUGHTER UNDER REVISED STATUTES, SECTION 1238. An indictment for manslaughter, under Revised Statutes, section 1238, must charge that the killing was done without a design to effect death, and while the doer of the act was engaged in the perpetration or attempt to perpetrate a crime not amounting to a felony, and it is not sufficient that these things may be inferred from the allegations made. Per Sherwood, J. *The State* v. *Emerich*, 110.

2. ——: ——: FELONY. In an indictment for a felony causing death, it is not sufficient to allege that the assault was feloniously made, and that the instrument used was feloniously used, but it must be charged that the act itself, which caused the death, was feloniously done. Per Sherwood, J. *Id.*

3. ——: ——: STATUTE. An indictment based upon a statute must contain all the forms of expression and descriptive words which will bring the defendant precisely within the definition of the statute. But where descriptive words are not used in the statute in defining the crime, it will be sufficient to use words of

equivalent import in the indictment, making the charge certain to a certain extent. Per Sherwood, J. *Ib.*

4. ——: ——: MANSLAUGHTER: REVISED STATUTES, SECTION 1241. An indictment for manslaughter under Revised Statutes, section 1241, which does not contain the words "pregnant with a quick child," is fatally defective. Per Sherwood, J. *Id.*

5. INDICTMENT: BURGLARY AND LARCENY: FELONIOUSLY. An indictment which charges that defendant "feloniously and burglariously, * * * did break into the storeroom * * * with intent the goods * * * then and there being, then and there feloniously and burglariously to steal * * * and did then and there burglariously steal, take 'and carry away," etc., sufficiently charges the felonious intent. *The State* v. *McGraw*, 161.

6. PLEADING, CRIMINAL: PERJURY: INDICTMENT. An indictment for perjury which names and particularizes the cause in which the alleged perjury was committed, and the court in which the cause was tried, avers the materiality of the issue so that the court can determine it; avers that the oath was administered by one having competent authority, sets out the facts alleged to have been sworn to, negatives their truth, and properly assigns perjury upon them, is sufficient under Revised Statutes, section 1424. *The State v. Huckeby*, 414.

7. THE INDICTMENT for perjury in this case examined and held sufficient.

POSSESSION.

1. EVIDENCE: POSSESSION. The possession of a check is *prima facie* evidence of its ownership by the holder. *Priest* v. *Way*, 16.

2. ——: ——: POSSESSION. The possession of plaintiff is insufficient to maintain suit to quiet title to land, where it is merely nominal and obtained by an act of trespass, for the sole purpose of instituting the proceeding, so as to shift the burden of establishing the title on the defendant. *Dyer* v. *Baumeister*, 134.

3. TENANTS IN COMMON: POSSESSION. The entry upon and possession of land by one tenant in common will not be esteemed *prima facie* adverse to his co-tenants, but will be held to be in support of the common title, and his possession and seisin is the possession and seisin of the others. To be adverse to his co-tenants his possession must be public and totally irreconcilable with the co-tenancy of another. *Long* v. *McDow*, 197.

4. EJECTMENT: PRIOR POSSESSION: TRESPASS. In actions of ejectment recovery on prior possession is generally limited to cases where the defendant is a mere intruder or trespasser, and does not extend to cases where he is in possession under color and claim of title. *Prior* v. *Scott*, 303.

5. ——— : ——— : PRESUMPTION. Where the prior possessor has been turned out by an opposing claimant in judicial proceedings, all presumptions in the former's favor, growing out of said prior possession, if not terminated, are, at least, shifted in favor of his successful opponent. *Ib.*

6. ——— : CONSTRUCTIVE POSSESSION. Possession is constructive when the property is in the custody and occupancy of no one, but rightfully belongs to the plaintiff; in which case the title draws to it the possession. *Brown* v. *Hartzell*, 564.

7. ——— : EQUITABLE TITLE. One having the equitable title and prior possession of land may maintain trespass. *Id.*

8. ——— : POSSESSION UNDER CONTRACT OF PURCHASE. Where one is in possession of land under a contract of purchase from another, the latter cannot maintain trespass against the former. *Id.*

See LAND AND LAND TITLES, 28.

POWERS.

POWERS. A naked power to sell and convey property does not include the power to mortgage it. *Price* v. *Courtney*, 387.

PRACTICE, CIVIL.

1. ——— : PLEADING : PRACTICE. A petition in a cause which does not ask for judgment against defendant as a stockholder, but only for an order for execution against him on the basis of a judgment already obtained against his corporation in another court, can only be treated as a motion for an order for an execution under Revised Statutes, section 736, and must fail because not filed in the court where the judgment was obtained. *Paxon* v. *Talmage*, 13.

2. PLEADING : PRACTICE : DEMURRER. A motion to strike out portions of the answer is properly treated as a demurrer, and as such relating back to the petition and questioning its sufficiency for any substantial error or defect which would render a verdict nugatory if founded upon it. *Id.*

3. PERSONAL INJURY : MEASURE OF DAMAGES. In actions for personal injuries the amount of damages must be left largely to the reasonable discretion of the jury. It, however, is not at liberty to give any sum it pleases. *Waldhier v. The Hann. & St. Joseph Ry. Co.*, 37.

4. ——— : ———. The judgment in this case affirmed, subject to a *remittitur*, which fixed the sum recovered at twenty thousand dollars, it appearing from the evidence that plaintiff, when injured, was able to earn a livelihood, at least, and that he lost the lower extremities of both his legs in the prime of life. *Id.*

5. ——— : PLEADING : PRACTICE. Under the statute (Revised Statutes, section 3553), mitigating circumstances may be pleaded in an action for slander and are admissible in evidence to reduce the amount of damages but not to defeat the action. *Trimble v. Foster*, 49.

6. ——— : PRACTICE : EVIDENCE. Evidence of defendant's condition and circumstances in life is admissible in an action for slander. *Id.*

7. INSTRUCTIONS. A cause will not be reversed by reason of erroneous instructions, which could not have prejudiced the appellant. *Breckinridge* v. *The American Central Insurance Co.*, 62.

8. ——— : PRACTICE : ASSIGNEE. The plaintiff is entitled to recover on an insurance policy, where it appears that he is the legal assignee of the policy, and is the equitable owner of the interest of the insured in the land on which the insured house was situated. *Ib.*

9. EVIDENCE. The defendant, in an action against it on a policy of insurance for the destruction of a house by fire, cannot complain of the rejection of testimony, even conceding it to have been competent, that the house was in bad repute, and had the reputation of being a bawdy house, where such evidence was offered only as affecting the value of the house, and the defendant's own evidence shows that its value was greater than that found by the jury. *Ib.*

10. INSTRUCTION. An instruction should not be given which singles out one statement in evidence and directs a verdict on the truth of such statement in disregard of the other evidence. *Spohn* v. *The Missouri Pacific Railway Co.*, 74.

11. TAX DEED : PRACTICE. The defendant in this case held to be in a position to attack a tax deed under a statute of Illinois which provides that no person shall be permitted to question such deed, unless he first shows that he or the person under whom he claims had title to the land at the time of the tax sale. *Cobb* v. *The Griffith & Adams Sand, Gravel and Transportation Co.*, 90.

12. EVIDENCE. Evidence as to the validity of a tax deed may be admitted subject to its legal effect being controlled by proper instructions. *Ib.*

13. QUESTION OF LAW AND FACT. When the statutes of a sister state are read in evidence it is for the jury to find the facts, and for the court to determine and apply the law arising thereon. *Ib.*

14. EVIDENCE : DEPOSITION : FORM OF QUESTION : OBJECTION : PRACTICE. Objection cannot be made on the trial to the reading of a deposition, merely because the questions are leading, when no such objection was made at the time of taking the deposition, where the evidence itself is competent. The competency and relevancy mentioned in Revised Statutes, section 2159, relate only to the substance of the evidence, and not to the form of the questions. *Patton* v. *The St. Louis & San Francisco Railway Co.*, 117.

15. SUIT TO QUIET TITLE: STATUTE: EVIDENCE. In an action under Revised Statutes, sections 3562 and 3563, to quiet title to land, evidence offered by the plaintiff that he is the owner in fee is properly excluded. It is sufficient for him to show that he is in the actual possession of the property, claiming either an estate of freehold, or an unexpired term of not less than ten years. *Dyer* v. *Baumeister*, 134.

16. ——: ——: POSSESSION. The possession of plaintiff is insufficient to maintain suit to quiet title to land, where it is merely nominal and obtained by an act of trespass, for the sole purpose of instituting the proceeding, so as to shift the burden of establishing the title on the defendant. *Id.*

17. ——. The statutory proceeding to quiet title was not intended as a substitute for the action of ejectment. *Ib.*

18. ——: EVIDENCE: REPUTATION. It is error to allow a witness to testify as to one's general reputation, without first laying the proper foundation by showing that the witness is acquainted with such reputation. *The State v. Brady*, 142.

19. AGENCY: QUESTION OF FACT. Whether one was the agent of one person or another in a transaction, *held*, properly submitted to the jury. *Schlesinger* v. *The Texas & St. Louis Ry. Co.*, 146.

20. PRACTICE: MISJOINDER OF PARTIES. The improper joinder of a defendant in an attachment suit is no ground for dissolving the attachment. *Albers* v. *Bedell*, 183.

21. ——: PRACTICE: INSTRUCTIONS. Where a mortgage valid on its face is sought to be impeached by extrinsic evidence, it is the duty of the court to submit to the jury for its determination the question whether the impeaching facts are true, and to direct that if they are established to their satisfaction they will find the conveyance to be void as to creditors. *Bullene* v. *Barrett*, 185.

22. ORDER OF PUBLICATION: DESCRIPTION OF PROPERTY: PRACTICE. An order of publication directed to non-resident parties in an action to enforce the state's lien for taxes upon real property need not describe the property. This is only required in suits for partition. R. S., sec. 3494. *Goldsworthy v. Thompson*, 233.

23. ESTOPPEL: ACTION FOR RESTITUTION OF PROCEEDS OF SALE UNDER JUDGMENT AFTERWARDS REVERSED. A plaintiff in an execution, when sued by the defendant therein for the restitution of the proceeds of the execution sale, because of the subsequent reversal of the judgment in the Supreme Court, will be estopped to claim in bar of such restitution that the defendant in the execution before sale thereunder conveyed the premises to a third person. *Griffith v. Randolph*, 260.

24. ——: ——. Nor will it be a good defence for the defendant in the restitution suit, that the first case, which was to enforce a vendor's lien, is pending on a second appeal to the Supreme Court

and that the plaintiff in the restitution suit is insolvent, and the defendant therein is, therefore, entitled to retain the proceeds of the execution sale until the second appeal in the original suit is determined, it appearing that such insolvency, if a fact, was caused by the act of the defendant in the restitution suit, in selling the property of the plaintiff therein under a judgment afterwards decided by the Supreme Court to be erroneous. *Id.*

25. PRACTICE: ADMISSION: BURDEN OF PROOF. In an action upon an assigned account, a general denial will impose upon the plaintiff the burden of proving both the account and the assignment, but both are admitted by a special defence. *Bond* v. *Long*, 266.

26. EJECTMENT: BOUNDARIES: PRACTICE. What are the boundaries of land conveyed by deed is a question of law; where the boundaries are is a question of fact. *The City of St. Louis* v. *Meyer*, 276.

27. ——: PRACTICE. It is error to instruct a jury to disregard surveys, properly in evidence, in determining the position of boundary lines mentioned in the deed in suit. *Id.*

28. ——: PRACTICE. The circuit court may entertain a motion to vacate a judgment in a street opening proceeding, filed more than four years after the judgment, and may sustain the motion at the subsequent term. *Id.*

29. PRACTICE: ALLEGATA AND PROBATA: CONSTRUCTION: PENALTY: STATUTE. Section 809, Revised Statutes, is a penal statute, and in proceedings under statutes exacting a penalty greater strictness of construction, both as to the allegations and the proof, is required than in ordinary cases. *Manz* v. *The St. Louis, Iron Mountain & Southern Ry. Co.*, 278.

30. ——: STATEMENT: AMENDMENT. A statement before a justice of the peace, under Revised Statutes, section 809, which is held insufficient by the Supreme Court, upon the cause being remanded to the circuit court, may be there amended, if warranted by the facts. *Id.*

31. PRACTICE: INSTRUCTIONS. Where the petition alleges and the evidence shows several acts of negligence as grounds of recovery plaintiff's right to recover should not be confined by instruction to one ground alone. *McDermott* v. *The Hannibal & St. Joseph Ry. Co.*, 285.

32. PRACTICE: SUING OUT WRIT OF ERROR. The suing out of one writ of error, and a dismissal of the same, does not preclude suing out another and giving the proper notice. *The State ex rel. Kearney* v. *Finn*, 310.

33. FRAUD: PRACTICE: PRESUMPTION. Where a petition charges fraud, but the decree of the court is silent on that issue, it will be pre-

sumed that the trial court did not think the charge sustained by the evidence. *Scheppelman* v. *Feurth*, 351.

34. ALLEGATIONS: PROOF: VARIANCE. No recovery can be had upon a petition declaring upon a contract to furnish certain specified articles for a given sum, where the evidence shows the furnishing of other and different articles than those specified in the contract. *Feurth* v. *Anderson*, 354.

35. PRACTICE: EVIDENCE. In an action upon a contract to make satisfactory repairs upon a certain reaper for the harvest of 1882, evidence that the defendant used such a reaper in the harvest of 1881, and expressed himself satisfied with it, is inadmissible. *Id.*

36. EVIDENCE: PRACTICE. It is better for the witnesses, where the possession of personal property is controverted, to state the facts bearing on such question, but where they state simply that one party was in possession, and no effort is made by the other party, by cross-examination or otherwise, to have the particular facts relating to such possession detailed, the judgment will not be reversed because of the admission of the evidence in the objectionable form. *McMillan* v. *Schweitzer*, 402.

37. PRACTICE: INSTRUCTION. An instruction, although it asserts a correct principle of law, is improperly given when there is no evidence upon which to base it. *The State* v. *Chambers*, 406.

38. LANDLORD AND TENANT: LIEN: REMOVAL OF CROP BY TENANT: PRACTICE. Under the statute (R. S., sec. 3083) the landlord has a lien upon the whole crop grown on the demised premises, but the tenant is not prohibited from removing any portion of it, but he shall not remove or dispose of it so as to endanger or hinder the landlord's collection of the rent (R. S., sec. 3091); and this is a question for the jury, but is not to be determined with reference to any property the tenant may have elsewhere. *Haseltine* v. *Ausherman*, 410.

39. PLEADING, AMENDMENT OF: PRACTICE. The refusal of the trial court in this case, to permit plaintiff, before final judgment, to amend his petition in order to conform it to the proofs, held to be error. *Carr* v. *Moss*, 447.

40. ——: ——. The code in relation to amendment of pleadings is liberal, and the courts in relation to the same should at least be as liberal as the statute. *Id.*

41. PROVINCE OF COURT AND JURY: EVIDENCE. Whether there is any evidence in a case, or what its legal effect may be, is to be determined by the court. If there is no evidence to support an issue, it is the duty of the court to so instruct the jury, but if there is any evidence to support the issue, it must go to the jury, who are the exclusive judges of its weight and sufficiency, however slight it may be, and whether it be direct or inferential. *Charles* v. *Patch*, 450.

42. EJECTMENT: COMMON GRANTOR. In ejectment, where both parties claim under a common source of title, the plaintiff need not show that the title of the common grantor is the legal title. *Id.*

43. QUESTION FOR JURY. Under the evidence in this case, *held*, that the question whether or not a will was made under undue influence should have been submitted to the jury. *Bush* v. *Bush*, 480.

44. PRACTICE: EJECTMENT: JUDGMENT. A judgment in ejectment is no bar to a second action between the same parties for the same property, whether the titles and defences in both cases be the same or not. *Ekey* v. *Inge*, 493.

45. ——: FINDING OF JURY. Where there is sufficient evidence to go to the jury, and proper instructions are given, their finding is conclusive. *Culbertson* v. *Hill*, 553.

46. ——: EVIDENCE: THREATS. Evidence of threats, general or special, or verbal indications of a similar nature, of the intended commission of a wrongful or criminal act, is admissible in both civil and criminal cases. *Id.*

47. ——: ——: VERDICT. A verdict may be based upon circumstantial evidence alone, *Id.*

48. ——: NEW TRIAL: AFFIDAVIT. The affidavit of an applicant for new trial must allege that the verdict is unjust and that the applicant has merits. *Id.*

49. ——: ——: ——. The information, as to the evidence upon which a new trial is asked, must come directly from the affidavit of the witnesses to whom the applicant for a new trial refers, or good cause must be shown for failure to so furnish it. *Id.*

50. ——: ——. Newly discovered evidence which is merely cumulative, or which is not sufficiently material to probably change the result, if a new trial were granted' will not warrant the granting of the same. *Id.*

51. ——: ——: QUESTION OF FACT. Whether one who claims land adversely under color of title entered and occupied the same in good faith, relying on the color of title as being the legal one, is a question of fact for the jury. *Gaines* v. *Saunders*, 557.

52. PRACTICE: EVIDENCE. It is error to admit incompetent testimony which has a tendency to corroborate a party in an immaterial and unimportant particular and to draw away the minds of the jurors from the point in issue. *Ritter* v. *The First National Bank of Sprinfield*, 574.

53. ——: EXCLUSION OF EVIDENCE: REMARKS OF COUNSEL. Counsel should not be permitted, over objection of the opposite party, to comment upon excluded testimony in argument to the jury and to

treat it as evidence in the case; and it is error, in such case, for the court to fail to rebuke counsel, and, at the request of the injured party, to again, in writing, exclude such testimony from the jury. *Id.*

54. EVIDENCE: IMPEACHING WITNESS. A party introducing a witness cannot impeach his testimony, either by general evidence showing his bad character for truth, or by proof of statements made out of court contradictory of his testimony. *Dunn* v. *Dunnaker*, 597.

55. ———: ———. The above rule does not apply where the party was entrapped into offering the witness, or it was brought about by imposition or surprise. *Id.*

56. INSTRUCTIONS. Instructions which are ambiguous and misleading should not be given. *Id.*

57. VENDOR AND VENDEE: ACTION FOR PRICE OF LAND: TENDER OF DEED. Where in the sale of land the promise to pay the purchase money and to make a deed are mutual and dependent covenants, the vendor, in an action to recover the purchase money, must either offer to convey or tender a deed so that the vendee on payment of the price can receive the deed as his property. *Olmstead* v. *Smith*, 602.

58. ———: ———: ———. But where by mutual agreement the deed is executed and acknowledged and placed in the hands of one as the agent of both parties, to be delivered on the payment of the purchase money, no formal tender of the deed is essential to enable the vendor to maintain his action for the purchase money. *Id.*

59. PRACTICE: IMMATERIAL VARIANCE. An immaterial variance between the pleadings and the proof will be disregarded. *Id.*

60. ———: MATERIAL VARIANCE. Material variances can, under the code (R. S., sec. 5565), be taken advantage of only by affidavit, showing in what respect the party complaining has been misled. *Id.*

61. EJECTMENT, ACTION OF PUTS WHAT IN ISSUE: TITLE: POSSESSION. In a statutory action of ejectment all the constituent elements of title are involved, including possession, right of possession, and right of property, and this puts in issue all the means and documents which evidence and establish the right of plaintiffs to recover. *Chapman* v. *Dougherty*, 617.

62. ———: EVIDENCE: WITNESS. In an action of ejectment by the devisee of land whose testator held under a deed from defendant, the latter is incompetent to testify as to the non-delivery of such deed. R. S., sec. 4010. *Id.*

63. PRACTICE: EVIDENCE: WITNESS. The disability, as a witness, of one of the original parties to a contract, or cause of action, in issue

and on trial, where the other party is dead, and the survivor is a party to the suit, is co-extensive with every occasion where such instrument or cause of action may be called in question. R. S., sec. 4010. Overruling *Bradley* v. *West*, 68 Mo. 69. *Id.*

64. ——: ——. The specific grounds of the objections to evidence should be stated. *The State* v. *Gonce*, 627.

65. COVENANT AGAINST ENCUMBRANCES, ACTION ON: RES JUDICATA. A grantor of land conveyed the same by a deed which contained a covenant against encumbrances done or suffered by him. There was in fact an outstanding lease made by the grantor, and before its expiration the grantee in the deed brought suit and recovered damages for breach of the covenant. *Held* (1) That the plaintiff's cause of action on the covenant was entire and indivisible, and (2) that, therefore, he could not maintain a second action, although the assessment of the rents and profits of the land as damages in the first suit was made only up to the time of its institution. *Taylor* v. *Heitz*, 660.

66. INSTRUCTION. An instruction is properly refused which leaves to the jury to determine a question both of fact and law. *Jordan* v. *The City of Hannibal*, 673.

67. JUDGMENT: WHEN IN EXCESS OF SUM CLAIMED. A judgment for taxes based on a constructive service and in excess of the sum asked for in the petition, is erroneous on the face of the record. *The State ex rel. Snyder* v. *Davidson*, 683.

68. ——: ——. A motion made by defendant, at the term at which the sale was had, to set aside such judgment should have been sustained. *Id.*

PRACTICE, CRIMINAL.

1. CRIMINAL LAW: INSTRUCTIONS: EVIDENCE. While it is the duty of the trial court in a criminal cause to give instructions upon all the law applicable to the facts in evidence, whether requested to do so or not, it should confine its instructions to the case made by the testimony. *The State* v. *Brady*, 142.

2. PRACTICE: WITNESS: CROSS-EXAMINATION. When the state introduces a witness and examines him, the defendant may cross-examine him as to all matters involved in the case, no matter how formal or unimportant the examination in chief may have been. *Id.*

3. ——: EVIDENCE: REPUTATION. It is error to allow a witness to testify as to one's general reputation without first laying the proper foundation by showing that the witness is acquainted with such reputation. *Id.*

4. INDICTMENT: FAILURE TO INDORSE MATERIAL WITNESSES THEREON. The objection that the names of all the material witnesses for the state are not indorsed on the indictment, should be raised by a motion to quash the indictment. *The State* v. *Griffin*, 608.

5. SELF-DEFENCE. An instruction on the question of self-defence approved. *Id.*

6. CRIMINAL LAW: FLIGHT OF ACCUSED. The flight of one charged with crime is a circumstance tending to prove guilt, and should be considered by the jury, and an instruction of the court to that effect is proper. *Id.*

7. CRIMINAL PRACTICE: REMARKS OF COUNSEL FOR STATE. Certain remarks of counsel for the state in his closing argument to the jury held to afford no cause for a reversal of the judgment. *Id.*

8. ——— : PROSECUTING ATTORNEY, INABILITY TO ACT: APPOINTMENT IN PLACE OF. The appointment by the court of four attorneys to prosecute a defendant on a criminal charge, where the prosecuting attorney was disqualified to act, by reason of having been of counsel for defendant, condemned as improper practice, although held not to be reversible error. *Id.*

9. ——— : PREJUDICE OF JUROR: NEW TRIAL. It is a good ground for a new trial when a juror, on his *voir dire* examination has stated that he has neither formed nor expressed an opinion as to the guilt or innocence of the accused, it comes to the knowledge of the latter, after verdict, that such juror had prejudged the case, and that fact is made to appear to the satisfaction of the court. *The State* v. *Gonce*, 627.

10. ——— : ———. Whether in such case the juror had prejudged the case is a question of fact to be determined by the trial judge, on sworn statements, and the finding of the trial court thereon, when supported by evidence which it was his duty to weigh and consider, will not be disturbed. *Id.*

11. ——— : ABSENCE OF DEFENDANT FROM TRIAL. The absence of defendant from the court during a part of the time of the trial, held, under the circumstances of this case, not to be a sufficient ground for a new trial. *Id.*

12. ——— : EVIDENCE. On a trial for murder it is not competent for the defendant to testify as to his belief and apprehension of bodily harm and danger when he killed the deceased. *Id.*

13. ——— : ———. It is for the jury to determine, from the facts in evidence, whether the accused had reasonable cause to believe or apprehend from the deceased, danger to his life or limb when he committed the homicide. *Id.*

14. ——: ——. The specific grounds of the objections to evidence should be stated. *Id.*

15. ——: IMPEACHING WITNESS. Where it is sought to impeach a defendant who testified as a witness, by offering to read in evidence his statements contained in an affidavit for a continuance, a sufficient foundation is laid for its introduction when it is shown to defendant, and he admits he signed and swore to it, although he was not examined as to its contents. *Id.*

16. ——. The record in this case held to sufficiently show that the judge who presided at the trial, and who was the judge of another circuit, had the authority to try the cause. *Id.*

17. ——: INSTRUCTION AS TO REASONABLE DOUBT. On the trial of a criminal offence, the instruction as to a reasonable doubt of defendant's guilt should not be based upon any particular defence, or part of the evidence, but should be a general instruction having reference to all the evidence in the case. *The State* v. *Rockett*, 666.

18. ——: SECONDARY EVIDENCE. Proof by oral evidence of the previous conviction of a witness of a crime is competent if such evidence is not objected to. *Id.*

19. ——: NEW TRIAL: NEWLY DISCOVERED EVIDENCE. Testimony, merely cumulative or the effect of which is only to discredit or impeach a former witness, is unavailing in a motion for a new trial on the ground of newly discovered evidence. *Id.*

PRACTICE IN SUPREME COURT.

1. THE SUPREME COURT WILL REVERSE a judgment and award a new trial in an extraordinary case, where the plaintiff's evidence is so improbable as to necessarily lead to the conclusion that the verdict was the result of passion or prejudice, or that the instructions of the court were wholly disregarded. *Spohn* v. *The Missouri Pacific Ry. Co.*, 74.

2. SUPREME COURT PRACTICE: SEPARATE REVERSALS. The defendants having been separately arraigned and sentenced, although tried together, the verdict is a separate finding as to each and the judgment may be affirmed as to one and reversed as to the other. *The State* v. *Stair*, 268.

3. PRACTICE. The Supreme Court will not weigh the evidence in an action at law. *Webb* v. *Webb*, 540.

4. CRIMINAL LAW: GRAND JURY. The Supreme Court will not reverse a judgment because the record fails to show that the grand jury which found the indictment was selected and summoned according to law. *The State* v. *Griffin*, 608.

PRESUMPTIONS.

1. POSSESSION: TITLE: PRESUMPTION: PATENT. It will be presumed that the United States government was in possession of land and had title thereto at the time of its issuance of a patent to the same. *Long* v. *McDow*, 197.

2. EVIDENCE: ANCIENT DEED: PRESUMPTION: POSSESSION. An ancient deed or other instrument, having nothing suspicious about it, is presumed genuine without express proof, and if found in the proper custody may be read in evidence, without proof of possession of the land conveyed. *Id.*

3. ENTRY UPON LAND: PRESUMPTION. It will be presumed that one's entry upon land was innocent and lawful, and that the heir will claim title through his ancestor, rather than through a wrongful and unwarranted entry upon the land of a stranger. *Id.*

4. ——: ——: PRESUMPTION. Where the prior possessor has been turned out by an opposing claimant in judicial proceedings, all presumptions in the former's favor, growing out of said prior possession, if not terminated, are, at least, shifted in favor of his successful opponent. *Prior* v. *Scott*, 303.

5. FRAUD: PRACTICE: PRESUMPTION. Where a petition charges fraud, but the decree of the court is silent on that issue, it will be presumed that the trial court did not think the charge sustained by the evidence. *Scheppelman* v. *Feurth*, 351.

6. APPEAL: PRESUMPTION. An appeal from an inferior court will be presumed to have been taken within the time allowed by law, where the record shows nothing to the contrary. *Feurth* v. *Anderson*, 354.

See INSURANCE, 5, 6.

PRINCIPAL AND AGENT.

1. AGENCY: BURDEN OF PROOF. Where one receives money as the agent of another, the burden is on him, in an action to account therefor, to show that he repaid it to his principal, or otherwise disposed of it by the latter's direction *Young* v. *Powell*, 128.

2. BROKER, AGENCY OF. A broker for the purpose of signing the memoranda of the sale is the agent of both parties to the contract which he makes; but in other respects he is only the agent of the party originally employing him. *Schlesinger* v. *The Texas & St. Louis Railway Co.*, 146.

3. AGENCY: QUESTION OF FACT. Whether one was the agent of one person or another in a transaction, *held*, properly submitted to the jury. *Id.*

4. NOTE: POSSESSION BY MAKER. The fact that a note, after having been put into circulation by the maker for value, comes into the hands of the latter as an agent of a third party, will not defeat recovery thereon by the latter. *Bowman* v. *The St. Louis Times*, 191.

5. PRINCIPAL AND AGENT: DECLARATIONS OF AGENT. The declarations of an agent will not bind his principal unless made at the time of doing some act within the scope of his agency, and form a part of the transaction itself. *McDermott* v. *The Hannibal & St. Joseph Railway Co.*, 285.

6. ——: ——. The declaration of the road master, who had authority to employ and discharge the section foreman, that the latter was not "a good railroad man," is not admissible to prove the fact that the section foreman was incompetent, but is admissible to prove that the company had notice of his incompetency, if that fact was established by other evidence, or there was other evidence tending to establish it, and such declaration being admitted, its effect should have been so controlled by an instruction. *Id.*

PRIVITY.

DECLARATIONS: PRIVIES IN BLOOD AND ESTATE. The declarations of one as to his manner of acquiring land and the name under which he acquired it are binding upon privies in blood and estate claiming under him. *Long* v. *McDow*, 197.

See ESTOPPEL, 4.

PROBATE COURT.

CONTRIBUTION: PROBATE COURT. Courts of law have adopted the equitable doctrine of contribution, and relief will be awarded in the probate court to one surety who has paid more than his proportionate share of the debt. *Jeffries* v. *Ferguson*, 244.

PROCESS.

1. PROCESS: SHERIFF, DUTY OF IN SERVICE OF SUMMONS. A sheriff is required to make a reasonable effort, in good faith, to serve a writ of summons, and must act honestly and diligently, having due regard to his duties to all litigants and to the public. The extent of inquiry to be made by him depends upon the circumstances of each case. *The State ex rel. Kearney* v. *Finn*, 310.

2. ——: ——. The return of *non est* to a writ of summons by an officer includes the assertion that he has made honest and diligent effort to find the defendants, as the law requires. *Id.*

3. ——: LIABILITY OF OFFICER FOR FALSE RETURN: DAMAGES. The fact that an order of publication intervened, in the regular course of practice in court, between a false return of *non est* to a summons by an officer and judgment by default, will not have the effect of shielding the officer from liability for the false return,

and the loss suffered by the defendant, in consequence of an execution sale of his property under the judgment by default, is a proper element of damages in an action by him against the sheriff for a false return. *Id.*

4. PROCESS, CONTRADICTION OF SHERIFF'S RETURN UPON. The return of a sheriff upon mesne or final process is generally conclusive upon the parties to the suit. His return upon an execution cannot be collaterally assailed, and so far as the particular cause is concerned, nothing can be alleged against the validity of the judgment by the parties thereto which is contradictory of the return; nor can any rights acquired under such judgment be divested or disturbed by disproving the return of the officer either upon the writs of summons or the execution. *Decker* v. *Armstrong*, 316.

5. ——: EXECUTION. In an action by an execution debtor against the sheriff and his sureties for the value of property exempt from execution, levied upon and sold by the sheriff, the latter may contradict his return by showing that the property so levied upon and sold was, in fact, that of the plaintiff in the execution and was by mistake so levied upon and sold. Such contradiction cannot revive the debt extinguished by the sale of the property and the application of the proceeds to the credit of the execution debtor, nor can the debt thus extinguished ever be revived in any collateral proceeding against the debtor. The execution debtor will not be allowed to extinguish his debt by a sale of the execution creditor's property and afterwards also recover the value of the property. *Id.*

PROHIBITION.

1. PROHIBITION. The circuit court possesses a general superintending control over the county court in the matter of granting or refusing dramshop licenses, and such control cannot be interfered with by the writ of prohibition, and this is so, although its judgment on the question before it was erroneous. *The State ex rel. Morse* v. *Burckhartt*, 533.

2. ——. Where a court has jurisdiction to determine a question before it, prohibition will not lie to restrain its exercise. *Id.*

PROXIMATE CAUSE.

See NEGLIGENCE, 3.

PUBLICATION.

ORDER OF PUBLICATION: DESCRIPTION OF PROPERTY: PRACTICE. An order of publication directed to non-resident parties to an action to enforce the state's lien for taxes upon real property need not describe the property. This is only required in suits for partition. R. S., sec. 3494. *Goldsworthy* v. *Thompson*, 233.

RAILROADS.

1. RAILROAD CONDUCTOR, DUTY TO PASSENGERS. It is the duty of a railroad company and of the conductor of its train to use the utmost vigilance and care in maintaining order and in protecting its passengers from violence and insults from others, though such other persons be passengers, and a failure to do so will render the company liable for damages to a person injured by reason of such neglect. *Spohn* v. *The Missouri Pacific Railway Company*, 74.

2. ——: ——. The company is as much liable for an ommission in this respect as it is for a negligent failure to provide safe machinery. *Id.*

3. PASSENGER, INJURY TO BY FELLOW-PASSENGER: DUTY OF CONDUCTOR. Where the injury is committed by one passenger on another, or is so threatened, it is necessary for the passenger suing therefore to show that the conductor knew of the threatened injury, or that, from the character and number of persons on the train and the surrounding circumstances, he might reasonably have anticipated it. He must, when the occasion arises for his interference, bring to his aid all the force at his command. *Id.*

4. RAILROAD: DUTY TO FENCE: BURDEN OF PROOF. In an action against a railroad company under Revised Statutes, section 809, for double damages for killing stock, the burden is on the company to show any circumstances exempting it from its duty to fence its right of way enjoined by the statutes. *Hamilton* v. *The Missouri Pacific Railway Company*, 85.

5. ——: ——: DOUBLE DAMAGES. The fact that the proprietor of land adjoining the right of way of a railroad company has failed to fence up to his line does not absolve the company from compliance with its statutory duty to fence its road where it passes through unenclosed lands. *Id.*

6. DOUBLE DAMAGE ACT, CONSTITUTIONALITY OF. The double damage act (R. S., sec. 809), held to be constitutional, both as regards the state and federal constitutions. *Id.*

7. RAILROADS: NEGLIGENCE: ESCAPE OF FIRE: EVIDENCE. In an action against a railroad company for negligently suffering its right of way to become covered with dry grass, etc., and negligently permitting fire to escape from one of its passing locomotives, which fire was communicated to plaintiff's premises, and his property thereby destroyed, after plaintiff has offered evidence tending to support the allegations of the petition, it is permissible for the defendant to offer testimony going to show that the engineer and fireman were competent and careful, and that the locomotive was of a new and approved make, was supplied with a good spark arrester, and had been properly inspected. *Patton* v. *The St. Louis & San Francisco Ry. Co.*, 117.

8. ——: ——: ——: ——. Where there is no dispute as to the

identity of the locomotive from which fire escaped and communicated to plaintiff's premises, it is competent to show that the same locomotive, on the same trip, and about the same time and place, set out other fires in its passage, as raising an inference of some weight that there was something unsuitable in its construction or management. Id.

9. PLEADING: PETITION. Where plaintiff sues for damages for the destruction by fire of wheat and oats unthreshed and in the stack, and corn upon the stalk, the petition covers not only the grain, but the straw and stalks. Id.

10. RAILROAD: DAMAGES BY FIRE: CONTRIBUTORY NEGLIGENCE. It is no defence to an action for damages against a railroad company for negligently permitting fire to escape from its locomotive and destroy plaintiff's crops, that the natural growth of grass and stubble was allowed to remain on plaintiff's field, and especially is this so when there is no evidence going to show that this is out of the usual course of husbandry. Ib.

11. RAILROAD: KILLING STOCK: EVIDENCE. In an action against a railroad company for double damages for killing stock, proof that the animal was killed at a point a quarter of a mile from the depot beyond the switch limits, where the road was fenced on one side but not on the other, is, *prima facie*, sufficient to show that the killing did not occur within the limits of an incorporated town, or at a public crossing. *Lepp* v. *The St. Louis, Iron Mountain & Southern Ry. Co.*, 139.

12. ——: ——: ——. It need not be shown, by direct evidence where the animal strayed upon the railroad track. Proof that it was killed at a point where there was no fence, but where the company was in duty bound to fence, is sufficient to take the case to the jury. *Id.*

13. TAXATION: POWER OF COUNTY COURT TO LEVY TAX. A railroad interest fund tax and railroad sinking fund tax, not being state taxes, or taxes necessary to pay the funded or bonded debt of the state, or for current county expenditures, or for schools (R. S., sec. 6798), cannot be levied by the county court without a compliance with section 6799 of the Revised Statutes. *The State ex rel. Clinton County* v. *The Han. & St. Joseph Ry. Co.*, 236.

14. RAILROADS: KILLING STOCK: DOUBLE DAMAGES: STATEMENT. A statement against a railroad company, under Revised Statutes, section 809, for double damages for killing a cow, which does not allege that she got upon the track at a point where the company was by law required to erect and maintain fences, is insufficient. *Manz* v. *The St. Louis, Iron Mountain & Southern Ry. Co.*, 278.

15. ——: ——: ——: ——. The statement is defective where it does not allege that the animal got on the track where the same "passes through, along or adjoining enclosed or cultivated fields or unenclosed lands," or that the killing took place at any such point. *Id.*

16. PRACTICE: ALLEGATA AND PROBATA: CONSTRUCTION: PENALTY: STATUTE. Section 809, Revised Statutes, is a penal statute, and in proceedings under statutes exacting a penalty greater strictness of construction, both as to the allegations and the proof, is required than in ordinary cases. *Id.*

17. ——: STATEMENT: AMENDMENT. A statement before a justice of the peace, under Revised Statutes, section 809, which is held insufficient by the Supreme Court, upon the cause being remanded to the circuit court, may be there amended, if warranted by the facts. *Id.*

18. MASTER AND SERVANT: BURDEN OF PROOF. The law presumes that the master exercises care in the employment of his servants, and the burden is upon him who alleges negligence in this particular to prove it. *McDermott* v. *The Hannibal and St. Joseph Railway*, 285.

19. ——: VICE-PRINCIPAL: NEGLIGENCE. In an action by a servant for damages occasioned by the incompetency and carelessness of a vice-principal, the master is liable whether he knew of such incompetency and carelessness or not, provided they were unknown to the person so injured. *Id.*

20. FELLOW SERVANTS. A section foreman who is intrusted by the railroad company with power to superintend, direct and control the workmen under his charge is not a fellow servant of such workmen. Affirming *Moore* v. *The W., St. L. & P. Railway*, 85 Mo. 588. *Id.*

21. MASTER AND SERVANT: VICE-PRINCIPAL, KNOWLEDGE OF. The master is chargeable with his vice-principal's knowledge of the incompetence and carelessness of a servant under his superintendence and control. *Id.*

22. ——: ORDERS OF MASTER: CONTRIBUTORY NEGLIGENCE. A servant is not bound, under all circumstances and at all hazards, to obey the orders of his master. He cannot recover damages of the master for injuries received while obeying the latter's order, if he had time to deliberate and voluntarily and with knowledge of the peril placed himself in a position in which he was more than likely to be injured. *Id.*

23. NEGLIGENCE. Whether one act of negligence is sufficient to establish incompetency in a servant depends upon the character of the act. *Id.*

24. PRACTICE: INSTRUCTIONS. Where the petition alleges and the evidence shows several acts of negligence as grounds of recovery, plaintiff's right to recover should not be confined by instruction to one ground alone. *Id.*

25. NEGLIGENCE OF FELLOW SERVANT. A servant cannot recover for an

injury occasioned by the incompetency, recklessness and carelessness of a fellow servant, where he had knowledge of the same before the injury, and notwithstanding such knowledge and without objection continued in the master's service. *Id.*

26. MASTER AND SERVANT: NEGLIGENCE OF VICE-PRINCIPAL: KNOWLEDGE OF SERVANT. A servant who takes employment to work under one who stands in the relation of vice-principal to the master, knowing that such vice-principal is incompetent and negligent in regard to his duty respecting the particular work the servant has undertaken to do, and continues in the service without objection, cannot recover of the master for injuries sustained in consequence of the incompetency and negligence of such vice-principal. *Id.*

27. PRINCIPAL AND AGENT: DECLARATIONS OF AGENT. The declarations of an agent will not bind his principal unless made at the time of doing some act within the scope of his agency, and form a part of the transaction itself. *Id.*

28. ——: ——. The declaration of the road master, who had authority to employ and discharge the section foreman, that the latter was not "a good railroad man," is not admissible to prove the fact that the section foreman was incompetent, but is admissible to prove that the company had notice of his incompetency, if that fact was established by other evidence, or there was other evidence tending to establish it, and such declaration being admitted, its effect should have been so controlled by an instruction. *Id.*

29. NEGLIGENCE: CONCURRENT ACCIDENT. Where an unforeseen event, concurrent in point of time with an act of negligence, co-operates with the latter to produce an injury, it will not excuse the negligence. *Id.*

30. PLEADING: PETITION. An action for the negligence of a fellow servant should not be blended in the same count with one for the negligence of a vice-principal. *Id.*

31. DAMAGES: STATUTE: SECTION 2122. Section 2122 of the Revised Statutes only authorizes an action for damages where the death of the injured party was caused by the wrongful act of the party sued, and an action cannot be maintained where the death was only hastened by such wrongful act. *Jackson* v. *The St. Louis, Iron Mountain & Southern Railway Co.*, 422.

32. RAILROAD: NEGLIGENCE: DUTY OF CONDUCTOR TO TRANSPORT PRISONER. Where one assuming to act as an officer, represents himself as such to the conductor of a railroad train, and offers to put upon the train as a passenger a person whom he claims to have arrested for crime, the conductor is not required to inquire into the cause of the arrest and the authority of the officer, but is justified in taking such prisoner in good faith upon the train and is guilty of no wrongful act in so receiving and transporting him. *Id.*

33. MASTER AND SERVANT: MASTER NOT LIABLE FOR CRIMINAL ACT OF

SERVANT: TRESPASS: RAILROADS: CONDUCTOR. The master is not liable for the criminal acts of his servant, not authorized or sanctioned by him, nor for his acts of wilful and malicious trespass. If a conductor knowingly and wilfully participates in the act of taking and transporting upon the cars, against his will, one whom he had no right to receive, he, and not the company, will be liable for his acts. *Id.*

34. RAILROADS: FAILURE TO MAINTAIN FENCES. Where a railroad company knows, or, by the exercise of reasonable diligence, might have known, of defects in its fences, required to be kept in repair, and fails to make the necessary repairs within a reasonable time after the acquisition of such knowledge, or after such knowledge should have been acquired, it is liable for damages resulting from such failure or neglect. *Wilson* v. *The St. Louis, Iron Mountain and Southern Ry. Co.*, 431.

35. ——: ——: KNOWLEDGE OF DEFECTS BY PLAINTIFF. Plaintiff will not be precluded from recovery because of the fact that he knew of the defects in the company's fence, before the injury and did not repair them. *Id.*

36. MASTER AND SERVANT: APPLIANCES FURNISHED SERVANT: DEFECTS IN: DUTY OF SERVANT. A servant in the use of appliances furnished him by the master is bound to take notice of those dangerous defects of which he has knowledge and which are obvious to his senses, but he is not bound to investigate for himself a department of work with which he has nothing to do and to set up his judgment against that of his master as to the safety of such appliances. *Devlin* v. *The W., St. L. & P. Ry. Co.*, 545.

37. RAILROAD: DEFECTIVE TRACK: ENGINEER. An engineer of a railroad, which is in general use, although having knowledge that the rails of the track were old, light and well worn, is not bound to pursue the inquiry and to determine for himself and at his own peril whether the road is or is not fit for use. *Id.*

38. ——: ——: ——. The engineer was not bound to quit the service, nor did he assume all risks from want of repair, unless the track was so far out of repair, to his knowledge, that it would be necessarily dangerous to the mind of a prudent person to run an engine over it. *Id.*

39. ——: ——. A railroad is not bound to furnish in such case a safe track, its duty in that respect being to use all reasonable care and precaution in placing and keeping it in good order and condition. *Id.*

40. ——: REASONABLE CARE. What is such reasonable care depends on the surroundings and the dangers to be fairly apprehended and encountered by the servant in the use of the track. *Id.*

REASONABLE CARE.

See RAILROADS, 40.

REASONABLE DOUBT.

See INSTRUCTIONS, 9, 10.

RECEIVER.

COSTS ADMINISTRATION: ATTORNEY'S FEES: RECEIVER. Fees paid by a receiver to his attorney for professional service and advice in regard to the management of the property impounded, are part of the costs of administration, and are not taxable as costs in the litigation, against the losing party. *City of St. Louis v. The St. Louis Gas Light Co.*, 224.

EQUITY: INJUNCTION: CLOUD UPON TITLE: ADVERTISEMENT: RECEIVER: TRUSTS AND TRUSTEES. *Ohnsorg v. Turner*, 127.

REFERENCE.

REFERENCE: WAIVER. It is too late to object for the first time after the trial and filing of the referee's report to the reference of the cause because it was not properly referable. *Young v. Powell*, 128.

REMITTITUR.

See PRACTICE, CIVIL, 4.

REPUTATION.

——: EVIDENCE: REPUTATION. It is error to allow a witness to testify as to one's general reputation without first laying the proper foundation by showing that the witness is acquainted with such reputation. *The State* v. *Brady*, 142.

RES JUDICATA.

COVENANT AGAINST ENCUMBRANCES, ACTION ON: RES JUDICATA. A grantor of land conveyed the same by a deed which contained a covenant against encumbrances done or suffered by him. There was in fact an outstanding lease made by the grantor, and before its expiration the grantee in the deed brought suit and recovered damages for breach of the covenant. *Held* (1) That the plaintiff's cause of action on the covenant was entire and indivisible, and (2) that, therefore, he could not maintain a second action, although the assessment of the rents and profits of the land as damages in the first suit was made only up to the time of its institution. *Taylor* v. *Heitz*, 660.

RESTITUTION.

1. ESTOPPEL: ACTION FOR RESTITUTION OF PROCEEDS OF SALE UNDER JUDGMENT AFTERWARDS REVERSED. A plaintiff in an execution, when sued by the defendant therein for the restitution of the proceeds of the execution sale, because of the subsequent reversal of

the judgment in the Supreme Court, will be estopped to claim in bar of such restitution that the defendant in the execution before sale thereunder conveyed the premises to a third person. *Griffith* v. *Randolph*, 260.

2. ——: ——. Nor will it be a good defence for the defendant in the restitution suit, that the first case, which was to enforce a vendor's lien, is pending on a second appeal to the Supreme Court, and that the plaintiff in the restitution suit is insolvent, and the defendant therein is, therefore, entititled to retain the proceeds of the execution sale until the second appeal in the original suit is determined, it appearing that such insolvency, if a fact, was caused by the act of the defendant in the restitution suit in selling the property of the plaintiff therein under a judgment afterwards decided by the Supreme Court to be erroneous. *Id.*

ST. LOUIS CITY.

1. ST. LOUIS CITY: STREET RAILWAY, REPAIR OF STREETS BY. The defendant, the Missouri Railway Company, a street railroad in the city of St. Louis, held bound, under the charter and ordinances of said city, to keep in repair its streets, to the extent of twelve inches outside of the rails along an extension of defendants' road from its former terminus to Tower Grove Park. *The City of St. Louis* v. *The Missouri Railway Co.*, 151.

2. CONTESTED ELECTION: MAYOR OF ST. LOUIS CITY. The general assembly has made no provision for the contest in the courts of the right to the office of mayor of the city of St. Louis. *The State ex rel. Francis* v. *Dillon*, 487.

3. ——: ——: REVISED STATUTES, SECTION 5528. The words "county officers," in Revised Statutes, section 5528, which provides that "the several circuit courts shall have jurisdiction in cases of contested elections of county officers," held not to include or apply to a contest for the office of mayor of the city of St. Louis. *Id.*

4. ——: ——: ST. LOUIS CITY: CHARTER. The charter of the city of St. Louis held not to confer on the council the power to enact an ordinance, declaring that a part of one of its streets should be vacated for twenty years, that the adjoining owners should have its use for that time and providing that at the end of the twenty years the street should revert to the city for a public thoroughfare. *Glasgow* v. *The City of St. Louis*, 678.

See MUNICIPAL CORPORATIONS, 7.

SALE.

PERSONAL PROPERTY: SALE: WEIGHING, ETC. Where personal property is actually sold and delivered, the matter of measuring, weighing, or counting will not be regarded as part of the contract of sale,

but will be considered as referred to adjustment on the final settlement of the account. *McMillan* v. *Schweitzer*, 402.

See TAX SALE.

SELF-DEFENCE.

See CRIMINAL LAW, 25.

SHERIFF.

See OFFICES AND OFFICERS.

SLANDER.

1. SLANDER: WHEN ACTION WILL LIE UPON CHARGE OF LARCENY. An action for slander will not lie where the words spoken, although of themselves amounting to a charge of larceny, are accompanied by a specification of the acts upon which the charge is based, which show that the property charged to have been stolen was not the subject of larceny. But if some of the property charged to have been stolen was the subject of larceny, the action may be maintained. *Trimble* v. *Foster*, 49.

2. SLANDER: PLEADING: ANSWER. To state a complete defence to the speaking of slanderous words, which of themselves amount to a charge of larceny, it must appear upon the face of the answer that they were accompanied by a statement of facts showing that no larceny was committed. *Id.*

3. ——: JUSTIFICATION. To justify the speaking of slanderous words charging larceny, by showing that their utterance was accompanied by a statement of the facts upon which they were based from which it appeared no larceny was committed, the defendant must show that to evey one to whom he uttered the slanderous words he stated the facts upon which he based the charge. *Id.*

4. ——: PLEADING: PRACTICE. Under the statute (Revised Statutes, section 3553), mitigating circumstances may be pleaded in an action for slander, and are admissible in evidence to reduce the amount of damages, but not to defeat the action. *Id.*

5. ——: PRACTICE: EVIDENCE. Evidence of defendant's condition and circumstance in life is admissible in an action for slander. *Id.*

SPECIAL LAW.

1. STATUTES, CONSTRUCTION OF: SPECIAL LAW. A special statute, applicable to a particular subject, if inconsistent with a general law in relation thereto, will prevail over the latter. *The State* v. *Green*, 583.

2. ——— : ———. It is a well settled rule in the construction of statutes that a later statute which is general and affirmative does not abrogate a former one which is particular and special, unless negative words are used in the former or the two acts are irreconcilably repugnant. *Id.*

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE. In a suit for the specific performance of a contract for the purchase of land, the evidence of the agreement should be reasonably certain and satisfactory. *Tedford* v. *Trimble*, 226.

2. The finding of the circuit court that the plaintiff in this cause had failed to make a case for specific performance, approved. *Id.*

STATUTES CITED AND CONSTRUED.

REVISED STATUTES OF 1879.

Section 107, see page 437.
Section 736, see page 13.
Section 809, see pages 85, 278.
Section 1238, see page 110.
Section 1241, see page 110.
Section 1249, see pages 406, 644.
Section 1250, see pages 406, 644.
Section 1268, see page 110.
Section 1335, see page 583.
Section 1424, see page 414.
Section 1487, see page 583.
Section 1561, see page 583.
Section 9, page 1629, see page 321.
Section 3693, see page 329.
Section 4010, see page 617.
Section 5228, see page 487.
Section 5337, see page 246.
Section 5565, see page 602.
Section 2122, see page 422.
Section 2159, see page 117.
Section 2496, see page 185.
Section 3083, see page 410.
Section 3091, see page 410.
Section 3217, see page 54.
Section 3225, see page 496.
Section 3494, see page 233.
Section 3553, see page 50.
Section 3562, see page 134.
Section 3533, see page 134.
Section 3654, see page 229.
Section 3692, see page 329.
Section 6090, see page 239.
Section 6798, see page 236.
Section 6799, see page 236.
Section 6818, see page 246.

WAGNER'S STATUTES, 1872.

Page 1207, section 221, see page 635.

ACTS OF 1849.

Page 92, see page 496.

ACTS OF 1885.

Page 63, see page 396.

STOCKHOLDER.

1. CORPORATION: STOCKHOLDER, WHEN EXECUTION MAY ISSUE AGAINST: STATUTE. Under Revised Statutes, section 736, where execution has issued against a corporation and been returned *nulla bona*, the judgment creditor may, upon order of the court in which the suit shall have been instituted, made upon motion in open court, after sufficient notice, have execution issued against any stockholder to the extent of the amount of such stockholder's unpaid balance on his stock. *Paxon* v. *Talmage*, 13.

2. ——: ——: ——. The proceeding authorized by Revised Statutes, section 736, is not an original one, but supplemental to a prior proceeding in the same court which resulted in a judgment against the corporation followed by a barren execution. *Id.*

3. ——: PLEADING: PRACTICE. A petition in a cause which does not ask for judgment against defendant as a stockholder, but only for an order for execution against him on the basis of a judgment already obtained against his corporation in another court, can only be treated as a motion for an order for an execution under Revised Statutes, section 736, and must fail because not filed in the court where the judgment was obtained. *Id.*

STREETS.

See MUNICIPAL CORPORATIONS, 1, 2, 3, 14.

STREET RAILWAY.

ST. LOUIS CITY: STREET RAILWAY, REPAIR OF STREETS BY. The defendant, the Missouri Railway Company, a street railroad in the city of St. Louis, held bound, under the charter and ordinances of said city, to keep in repair its streets, to the extent of twelve inches outside of the rails along an extension of defendant's road from its former terminus to Tower Grove Park. *City of St. Louis v. The Missouri Railway Company*, 151.

SUBROGATION.

LIEN: SUBROGATION. One loaning money to another, to remove a lien on land, is not thereby subrogated to the rights of the lienor against the land. *Price* v. *Courtney*, 387.

SUPERSEDEAS.

See APPEAL, 4.

SWAMP LANDS.

1. SWAMP LAND, SALE OF BY SHERIFF: TITLE. A sale of swamp land by the sheriff, under an order of the county court authorizing him

to sell such swamp lands as had been certified to the office of the county clerk by the state register of lands, will not be effectual in passing any title to the land where it had not been so certified when the sale was made. *Prior* v. *Scott*, 303.

2. SWAMP LAND, SALE OF BY COMMISSIONER: DEED: TITLE. A deed to swamp land, executed by the swamp land commissioner, in pursuance of a sale made by order of the county court, after the land has been patented by the state to the county, will pass to the grantee the title of the county. *Id.*

TAXATION.

1. TAXATION: POWER OF COUNTY COURT TO LEVY TAX. A railroad interest fund tax and railroad sinking fund tax, not being state taxes, or taxes necessary to pay the funded or bonded debt of the state, or for current county expenditures, or for schools (R. S. sec. 6798), cannot be levied by the county court without a compliance with section 6799 of the Revised Statutes. *The State ex rel. Clinton County* v. *The Hannibal & St. Joseph Railroad Company*, 236.

2. ——: ——. The county court has no implied power to levy a tax. Such power must be clearly and expressly given by statute, and if the legislature in conferring the power imposes conditions upon which it may be exercised, such conditions must be observed before the power can be lawfully exercised. *Id.*

3. TAXATION: BANK STOCK. Assessment of taxes against bank stock must be made against the shareholders personally. *The City of Springfield* v. *The First National Bank of Springfield*, 441.

4. ——: ——. The fact that the officers of the bank refuse to furnish the assessor with a list of shareholders, affords no reason for making the assessment and enforcing the tax against the property of the bank. *Id.*

TAXES.

1. LAND TITLE: ACT OF FEBRUARY 27, 1874: INSTRUCTION. The claimant, at the date of the act of February 27, 1874 (R. S. 1879, sec. 3225), requiring persons claiming land in possession of another to bring suit therefor within one year from the approval of the act, his predecessors in title within thirty years, and the persons in possession are the only persons within the purview of said act, and an instruction involving said act which requires the jury to find that persons, other than those within its purview, had not paid taxes on the land as stated in the act, is erroneous. *Rollins* v. *McIntire*, 496.

2 ——: ——. Whether or not the claimant and his predecessors in title paid the taxes for thirty years preceding the passage of said act of 1874, is a matter of proof not of presumption. *Id.*

3. ——— : ———. The non-payment of said taxes need not be directly proved, but may be inferred from facts and circumstances bearing on said question. *Id.*

4. BACK TAXES. JURISDICTION OF JUSTICES IN SUITS TO ENFORCE STATE'S LIEN FOR. Justices of the peace have no jurisdiction in suits to enforce the state's lien for back taxes. *The State ex rel. Gordon* v. *Hopkins*, 519.

5. CRIMINAL LAW : COUNTY COLLECTOR : COLLECTING ILLEGAL TAXES : STATUTE. Prosecutions against a county collector for collecting illegal taxes must be founded on Revised Statutes, section 1487, which makes it a misdemeanor for a collector to unlawfully collect taxes when none are due, or to unlawfully and wilfully exact and demand more than are so due. *The State* v. *Green*, 583.

6. ——— : ——— : STATUTE. Such prosecutions cannot be instituted under Revised Statutes, section 1335, for obtaining money under false pretenses, nor under Revised Statutes, section 1561, for obtaining money by use of a cheat, deception, false statement, etc. *Id.*

TAX DEED.

1. TAX DEED. The defendant in this case held to be in a position to attack a tax deed under a statute of Illinois which provides that no person shall be permitted to question such deed, unless he first shows that he or the person under whom he claims had title to the land at the time of the tax sale. *Cobb* v. *The Griffith & Adams Sand, Gravel and Transportation Company*, 90.

2. EVIDENCE. Evidence as to the validity of a tax deed may be admitted subject to its legal effect being controlled by proper instructions. *Id.*

3. TAX DEED : STATUTE. The provisions of the statute prescribing the form for tax deeds are mandatory and while the deed need not recite literally the language of the statute, its recitals must show a strict compliance with the statutory requirements. *Pearce* v. *Titsworth*, 635.

4. ——— : ———. The tax deed in this case held not to conform to the positive and mandatory provisions of the law, and for that reason to be void on its face. *Id.*

5. TAX DEED VOID ON ITS FACE : LIMITATIONS. A tax deed void on its face will not set the special statute of limitations (W. S., sec. 221, p. 1207), in motion. Following *Mason* v. *Crowder*, 85 Mo. 526. *Id.*

TAX SALE.

EJECTMENT : TAX SALE : REAL ESTATE OF WIFE. A wife's interest in her real estate belonging to her before her marriage is not affected

by a tax suit and sale to which she was not a party, and the purchaser at such sale cannot recover in an action of ejectment against her tenant, although the husband was a party to the tax suit. *Gitchell* v. *Messmer*, 131.

TENANTS IN COMMON.

1. TENANTS IN COMMON: POSSESSION. The entry upon and possession of land by one tenant in common will not be esteemed *prima facie* adverse to his co-tenants, but will be held to be in support of the common title, and his possession and seisin is the possession and seisin of the others. To be adverse to his co-tenants his possession must be public and totally irreconcilable with the co-tenancy of another. *Long* v. *McDow*, 197.

2. THE EVIDENCE in this case held not to be of such a nature as to overcome the presumption prevailing between tenants in common where one takes possession of the property owned by all. *Id.*

TENDER.

See VENDOR AND VENDEE, 2, 3.

THREATS.

See EVIDENCE, 53, 65.

TITLE.

See LAND AND LAND TITLES, 4.

TRESPASS.

1. EJECTMENT: PRIOR POSSESSION: TRESPASS. In actions of ejectment recovery on prior possession is generally limited to cases where the defendant is a mere intruder or trespasser, and does not extend to cases where he is in possession under color and claim of title. *Prior* v. *Scott*, 303.

2. TRESPASS. The action of trespass can only be maintained where the plaintiff is in the actual or constructive possession of the premises. *Brown* v. *Hartzell*, 564.

3. ——: CONSTRUCTIVE POSSESSION. The possession is constructive when the property is in the custody and occupancy of no one, but rightfully belongs to the plaintiff; in which case the title draws to it the possession. *Id.*

4. ——: EQUITABLE TITLE. One having the equitable title and prior possession of land may maintain trespass. *Id.*

5. ———: POSSESSION UNDER CONTRACT OF PURCHASE. Where one is in possession of land under a contract of purchase from another, the latter cannot maintain trespass against the former. *Id.*

TRUSTS AND TRUSTEES.

1. DEED, CONSTRUCTION OF: TRUSTEE: EQUITY. A deed construed and held to confer upon the wife of the grantor the absolute dominion in the property whenever she should exercise the power of disposition conferred in it; and also held that she had sufficiently exercised such power, and the trustee named in the deed was bound to convey the legal title, and that the trustee being absent from the state and failing to do so, the land court of St. Louis, in the exercise of its chancery powers over trustees, properly divested the title out of the trustee, and vested it in the wife's appointee. *Hardy* v. *Clarkson*, 171.

2. DEED OF TRUST: PARTITON: PARTIES. *Semble* that a trustee and *cestui que trust* in a deed of trust given on land to secure the payment of a debt are proper parties in a suit for the partition of the prmises. *Yates* v. *Johnson*, 213.

3. TRUST IN LANDS, EVIDENCE TO ESTABLISH. In order to establish by parol a trust in lands the evidence must be so cogent as to leave no room for reasonable doubt in the mind of the chancellor. *Rogers* v. *Rogers*, 257.

4. FRAUDS: TRUSTS. Frauds and trusts are not within the statute of frauds. *Id.*

5. THE EVIDENCE in this case held insufficient to entitle defendant to affirmative relief. *Id.*

6. CLIENT AND ATTORNEY: TRUSTEE. Where an attorney purchases land in his own name, at a sale under an execution in favor of his client, the latter has the option to treat the attorney as his trustee, but such right of election must be exercised by the client within a reasonable time. *Ward* v. *Brown*, 468.

7. ADMINISTRATOR. Where the client, in such case, is the administrator of an estate, his acts and conduct in the matter of such purchase will bind the heirs and the estate. *Id.*

EQUITY: INJUNCTION: CLOUD UPON TITLE: ADVERTISEMENT: RECEIVER: TRUSTS AND TRUSTEES. *Ohnsorg* v. *Turner*, 127.

VARIANCE.

1. VARIANCE. In an action for the fraudulent abstraction and conversion of property, there can be no recovery on the ground that it was obtained as a gift by the exercise of undue influence. *Priest* v. *Way*. 16.

2. ALLEGATIONS: PROOF: VARIANCE. No recovery can be had upon a petition declaring upon a contract to furnish certain specified articles for a given sum, where the evidence shows the furnishing of other and different articles than those specified in the contract. *Feurth* v. *Anderson*, 354.

3. PRACTICE: IMMATERIAL VARIANCE. An immaterial variance between the pleadings and the proof will be disregarded. *Olmstead* v. *Smith*, 602.

4. ——: MATERIAL VARIANCE. Material variances can, under the code (R. S. sec. 5565), be taken advantage of only by affidavit, showing in what respect the party complaining has been misled. *Id.*

VENDOR AND VENDEE.

1. EVIDENCE. Where the vendor of property remains in possession openly as the lessee of the vendee, making no claim to the ownership of the property, his declarations as to such possession are inadmissible against the vendee. *Gordon* v. *Ritenour*, 54.

2. VENDOR AND VENDEE: ACTION FOR PRICE OF LAND: TENDER OF DEED. Where in the sale of land the promise to pay the purchase money and to make a deed are mutual and dependent covenants, the vendor, in an action to recover the purchase money, must either offer to convey or tender, a deed so that the vendee on payment of the price can receive the deed as his property. *Olmstead* v. *Smith*, 602.

3. ——: ——: ——. But where by mutual agreement the deed is executed and acknowledged and placed in the hands of one as the agent of both parties, to be delivered on the payment of the purchase money, no formal tender of the deed is essential to enable the vendor to maintain his action for the purchase money. *Id.*

VERDICT.

——: ——: VERDICT. A verdict may be based upon circumstantial evidence alone. *Culbertson* v. *Hill*, 553.

VICE-PRINCIPAL.

See MASTER AND SERVANT, 6, 8, 12.

WAIVER.

1. WAIVER. One suing for the value of sand taken from premises of which he claims to be the owner thereby waives the trespass. *Cobb* v. *The Griffith & Adams Sand, Gravel and Trans. Co.*, 90.

2. REFERENCE: WAIVER. It is too late to object for the first time after the trial and filing of the referee's report to the reference of

the cause because it was one not properly referable. *Young* v. *Powell*, 128.

See INSURANCE, 10.

WIDOW.

1. WIDOW, ALLOWANCE FOR: STATUTE. The four hundred dollars allowed the widow by Revised Statutes, section 107, is an absolute provision for her own use to be disposed of as she may see proper, and she is entitled to it regardless of whether or not there are children of the marriage or the deceased left a family. *Mowser* v. *Mowser*, 437.

2. ——: ——: ABANDONMENT OF HUSBAND BY WIFE. The widow is entitled to the allowance provided for by Revised Statutes, section 107, where she remained the wife of the deceased to the time of his death, although she may have abandoned him without sufficient cause. *Id.*

WILLS.

1. WILL, CONSTRUCTION OF: LEGACY. A clause of a will construed and held that a legacy of fifty-six thousand dollars bequeathed therein, should bear six per cent. interest from the death of the testator. *Way* v. *Priest*, 180.

2. THE RULE as to the computation of interest in this case where there were part payments stated. *Id.*

3. DEVISE: EQUITABLE LIEN. Where real estate is devised to one who is, by the will, required to pay to each of the other devisees named in the will a sum sufficient to make the devises to all equal in value the law in such case will attach an equitable lien on the land for the sums so required to be paid. *Dudgeon* v. *Dudgeon*, 218.

4. WILL: UNDUE INFLUENCE: EVIDENCE. On the trial of an issue whether or not a will was made under undue influence, declarations of the alleged testator, made before and after its execution, are inadmissible as evidence of the facts mentioned in such declarations. *Bush* v. *Bush*, 480.

5. ——: ——: ——. Such declarations are only admissible when the condition of the testator's mind is the point of contention, or it becomes material to show the state of his affections, and they are then received as external manifestations of his mental condition and not as evidence of the truth of the facts referred to in the declarations. *Id.*

6. EVIDENCE. The declarations of a legatee and a co-defendant, tending to show that she exercised undue influence on the mind of the testator, are not admissible where the petition does not charge her with its exercise. *Id.*

7. QUESTION FOR JURY. Under the evidence in this case, *held*, that the question whether or not the will was made under undue influence should have been submitted to the jury. *Id.*

WITNESSES.

1. PRACTICE: WITNESS: CROSS-EXAMINATION. When the state introduces a witness and examines him, the defendant may cross-examine him as to all matters involved in the case, no matter how formal or unimportant the examination in chief may have been. *The State* v. *Brady*, 142.

2. HUSBAND AND WIFE: PARTIES: ESTOPPEL: WITNESS. Where a wife assists her husband in the conduct of a newspaper, and they, as partners, have mutual dealings with a third party, she is *prima facie*, at least, entitled to be joined with the husband in a suit against such party for a debt due the paper, and where, in such suit, defendant receives the benefit of an off-set as against both husband and wife, he will be estopped to complain as to misjoinder of parties; and the wife, having a substantial interest in the controversy, is competent to testify in the cause. *Dunifer* v. *Jecko*, 282.

3. ——: EVIDENCE: WITNESS. In an action of ejectment by the devisee of land whose testator held under a deed from defendant, the latter is incompetent to testify as to the non-delivery of such deed. R. S., sec. 4010. *Chapman* v. *Dougherty*, 617.

4. PRACTICE: EVIDENCE: WITNESS. The disability, as a witness, of one of the original parties to a contract, or cause of action, in issue and on trial, where the other party is dead, and the survivor is a party to the suit, is co-extensive with every occasion where such instrument or cause of action may be called in question. R. S., sec. 4010. Overruling *Bradley v. West*, 68 Mo. 69. *Id.*

WRIT OF ERROR.

PRACTICE: SUING OUT WRIT OF ERROR. The suing out of one writ of error, and a dismissal of the same, does not preclude suing out another and giving the proper notice. *The State ex rel. Kearney* v. *Finn*, 310.